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Legal Positivism and the Normativity of Law

by

Guangwei Ouyang

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Doctor of Philosophy

Department of Philosophy

Edmonton, Alberta
Spring 1996

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30/1/96

I dedicate this thesis to my parents, Yun-San Ouyang and Feng-Xian Li, whose love and support have given my life meaning and hope.

Abstract

Contrary to the "received" view that only natural law theorists can account for the normativity of law, in Part I of the thesis I argue that the issue of normativity does not even arise for natural law theory. It is an issue, however, for legal positivists.

The main content of the thesis is my critical examination of three legal positivist accounts of the normativity of law, those of Kelsen, Hart and Raz. Through analyzing Kelsen's conception of juristic normativity, I argues in part II that Kantian transcendental methodology may help Kelsen overcome the traditional jurisprudential dichotomy of fact and value, but it may also lead his theory to go beyond the boundary of legal positivism and force us to investigate the justificatory foundation of the normative force of law. In Part III, through examining Hart's conception of social normativity, I argue that while Hart's account of social normativity has its advantage of explaining the obligatory nature of law, it may force us beyond positivism to search for the moral or political foundation of the normativity of law. By discussing Raz's conception of practical normativity, I argue that while Raz's account has advanced our understanding of the normative nature of law, several basic theses constituting Raz's account are not really compatible with the central doctrine of his exclusive version of legal positivism.

In conclusion, I suggest that the common problems explored in

Kelsen's, Hart's and Raz's theories of the normativity of law are essentially associated with an unwarranted assumption of legal positivism, i. e., that the normativity of law can be and should be understood only in terms of the source of law as a social fact within an analytic jurisprudential inquiry. I further suggest that an adequate explanation of the normativity of law requires us to go beyond this assumption and to establish a higher social theory of law, a theory which can offer an intelligible explanation and justification of why law as a social fact must have its normative force in social practice.

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Introduction: The Purpose of the Thesis and a Roadmap of its Argument

Contemporary literature in legal philosophy abounds with the term "normativity" and its cognates, such as normative jurisprudence, normative theory of law, normative idealism, normative positivism, normative realism, normative aspect of law, normative nature of law, normativity of law, etc. The term "normativity" has been used in very different contexts and has carried much contested jurisprudential, moral, political and ideological baggage. For example, in the critical legal studies (CLS) movement, the term "normativity" may be used to refer to a dominant political ideology reflected in a given legal system. Or it may mean a value laden perspective of a group of legal philosophers who normatively interpret the nature of law, like Marxist legal philosophers and feminist legal theorists. In natural law theory, normativity may be used as a synonym for the moral nature of law, a moral obligation to obey the law, the moral evaluation of law, moral justification of law, or more generally a moral or political approach to jurisprudential issues. Given all the possible meanings of normativity in the naturalistic tradition, the issue of normativity has been understandably regarded as a forbidden area for legal positivists. For many decades, to raise the issue of normativity was viewed as a betrayal of the positivist spirit in jurisprudential study.

However, in the last thirty years or so, some leading contemporary legal positivists, such as Hans Kelsen, H.L.A. Hart, and Joseph Raz, have paid much attention to the issue of normativity. Locating and explaining the normativity of law has become one of the central themes in contemporary legal positivism. But unfortunately much of these efforts has not been fully recognized and understood. On the one hand, for some legal positivists the talk of the issue of normativity will lead a legal theory astray from the mainstream of analytic jurisprudence, since the only authentic topic for legal positivism is the establishment of a value-free theory about the identification of the existence of law. On the other hand, for some anti-positivists talk of normativity within a legal positivist framework signifies the "self-destruction of legal positivism", since the combination of normativity and positivity is internally incoherent.[1]

What is the issue of normativity in legal philosophy? Is it important in understanding the nature of law? How are we to understand Kelsen's, Hart's and Raz's efforts to give positivistic accounts of the normativity of law? What are the theoretical implications of their accounts of the normativity of law? This thesis is an attempt to answer these questions. In the following I shall provide a roadmap of my argumentation in each part of the thesis.

---

[1] J. D. Goldsworthy, "The Self-destruction of Legal Positivism", Oxford Journal of Legal Studies, Vol. 10, No. 4, (1990), 449; D. Beyleveld and R. Brownsword, "Normative Positivism: The Mirage of the Middle Way", Oxford Journal of Legal Studies, Vol. 9, (1989), 463.

The first part of the thesis is a conceptual analysis of the meaning of normativity, the issue of normativity and the problem of the normativity of law in legal philosophy. First, through a conceptual analysis, I suggest that the issue of normativity in legal philosophy can be understood in at least two different ways. Normativity is regarded either as an normative approach to the nature of law or as a quality or feature of a legal system. To illustrate the former sense of normativity, I discuss how the issue of normativity is understood as a critical method in CLS and as a content-dependent method in natural law theory. To analyze the latter sense of normativity, I examine the issue of normativity understood in the tradition of legal positivism. Two sets of conceptual distinctions are made with respect the concept of law and the theoretical issues regarding the nature of law. One is the distinction between the factual aspect of law and the normative aspect of law, and the other is the distinction between the issue of the identification of the existence of law and the issue of the normative nature of law.

Second, contrary to a common belief that the problem of normativity of law is best dealt with by natural law theory, I argue that the issue of the normativity of law, strictly speaking, does not arise as a problem for natural law theory. If the central doctrine of natural law theory (regardless of its any particular form) is understood as law essentially based on morality, then natural law theory won't be able to grant any distinctive normative status to law separate from morality. I further argue that the issue of the normativity of law does arise as a problem for legal positivism, since emphasis on the distinctive character of law from morality is a mark of legal positivism and furthermore since positivism is so concerned to give a value-free account of the nature of law. I further argue that if the normative aspect of law is understood as an essential part of the nature of law, then providing an intelligible understanding of the normativity of law, for legal positivism, should be as viewed as being as important as offering a theory about the identification of the existence of law. I suggest that the issue of normativity constitutes a genuine challenge to legal positivism, that is, to articulate a legal theory which gives an account of the factual aspect as well as the normative aspect of law.

Some prominent legal positivists, such as Kelsen, Hart and Raz, are clearly aware of this contemporary challenge. The main content of the thesis is my presentation of certain positivistic responses to this challenge: my reconstructions of Kelsen's juristic notion of normativity, Hart's concept of social normativity and Raz's account of practical normativity. These reconstructions are not simply an attempt to piece together their thoughts on this issue. I intend to present their theories about the nature of law in the light of the issue of normativity. Given that a certain amount of research has been done on relevant issues, my presentation of each of the theories is carried through conversation with several established critics of Kelsen's, Hart's and Raz's theories, such as Stanley Paulson, Frederick Schauer, Wil Waluchow, Roger Shiner, Brenda Baker, Barry Hoffmaster, Neil MacCormick, Gerald Postema, John Finnis, and Ronald Dworkin. In some cases I challenge their interpretations and criticisms, and in others I offer my interpretations to support their views. I believe that we can learn as much from these 'secondary' materials as from reading Kelsen's, Hart's and Raz's original works, because each of these critics gives a new perspective to look at the issue we are investigating.

In Part II, I reconstruct Kelsen's conception of juristic normativity of law in the Kantian tradition. I try to show why Kelsen is not committing a "normative fallacy" as MacCormick suggests, and why we shall not understand his concept of normativity as "justified normativity" as Raz claims. By examining his notions of normative validity and the basic norm, I argue that Kelsen's account of the normativity of law will necessarily lead us to the question concerning the very foundation of the normative force of law.

In Part III, I examine Hart's notion of social normativity of law in both The Concept of Law and Essays on Bentham. In the former, Hart attempts to provide an explanation of the normativity of law in terms of his notion of social rule. Through criticizing a pure descriptive notion of legal obligation offered by Barry Hoffmaster, I argue that Hart's notion of legal obligation must be understood from the perspective of the internal/normative point of view. In the latter, Hart tries to explain the normativity of law in terms of his notion of authoritative legal reason. Through analyzing Postema's powerful criticism of Hart's notion of authoritative reason, I argue that Hart's account of the normativity of law from his notions of social rule and authoritative reason will inevitably direct us to question the moral and political basis of the normative nature of law.

In Part IV, Raz's concept of practical normativity is examined against his theory of practical rationality and his theory of practical authority. I start with an examination of Raz's criticisms on the sanction-based and the morality-based theory of law's normativity. I suggest that the validity of Raz's criticism is based on his assumption that the nature of law should be understood as exclusionary reasons. However, through Perry's and Schauer's criticisms of his doctrine of exclusionary reasons, I suggest that the thin sense of exclusionary reasons - rules play a certain role in a piece of practical reasoning - is far from enough to provide a foundation for Raz to identify the institutional force of law with a particular kind of force, exclusionary force. This leads to his theory of practical authority, which is supposed to explain how the exclusionary force of law might be justified by the very nature of law to claim authority. Through discussing Shiner's criticism of Raz's account of authority, I suggest that Raz may appeal to a thick notion of law as having legitimate authority to justify the exclusionary/normative force of law. Finally, I analyze Raz's detached approach to law's normativity and argue that Raz's interest in the issue of normativity inevitably leads him to go beyond the analytic jurisprudence practiced by legal positivism.

In my short conclusion, I recast the issues discussed in the main content of the thesis. The common problems explored in my reconstructed versions of Kelsen's, Hart's and Raz's accounts of the normativity of law, I think, are essentially tied to an unwarranted assumption, that is, the normativity of law must be understood in terms of the social fact thesis. Given the nature of the problem of the normativity of law, I argue that any positivistic account of the normativity of law can only get the project off the ground, and that what is needed for an adequate account of the normativity of law is some explanatory/justificatory principle(s) external to jurisprudence. To offer such an explanatory/justificatory principle, we in fact look for a high social theory as it is suggested by William Twining and Morris Raphael Cohen. Finally, I suggest that a high social theory of law is not necessarily a value-loaded normative theory, such as theories loaded with moral or political ideology about the nature of law in CLS. Rather it should ideally be a value free descriptive social theory, the purpose of which is to offer an intelligible explanation/justification of the ultimate reason and foundation of why law must be institutionalized normative social system.

It is not my intention in this thesis to establish some novel theory of the normativity of law. Nor is my intention to give a systematic criticism of each of the theories I am going to present in the main content of the thesis. Rather, my project is much more modest than "inventing a new theory" or "providing systematic critiques". My purpose here is first to offer a conceptual understanding of the issue of normativity, because I think that the confusion surrounding this term "normativity" and the issue of normativity is so bad that no progress can be made if it is not cleared up. My second purpose is to examine how much progress we have already made within the tradition of legal positivism, because I think that the mere project of reconstructing a positivistic understanding of the normativity of law will puzzle enough legal scholars in both positivist and anti-positivist camps. And finally I want to suggest that which direction we should go in order to further our understanding of the issue of the normativity of law. To be honest, I have found that even to accomplish these modest tasks is much more difficult than I thought given the nature of the problem we are dealing with. In any case, I hope that this is just a starting point for a much larger project. We human beings create our legal institutions on the earth but we still do not quite understand why legal institutions as creatures of our own making exert their special normative force on us. We ought to obey law or we are obligated to do what laws require even at the expense of our moral autonomy. There must be some intelligible explanation of law as a normative phenomenon and a legal system having such normative power. But first we must examine what we have understood so far, then we can go a further step to understand more. In this sense, I hope that the result of my conceptual analysis and critical reconstruction of legal positivist theories of the normativity of law not only has some instrumental value for this long confused issue in jurisprudence, but also theoretical significance for suggesting a new direction of study in this subject and for understanding the nature of law in social reality.

Part I The Concept of Normativity in Legal Philosophy

Many of the difficulties with the concept of normativity do not simply arise on the level of different interpretations of the concept given by each legal scholar. Even if we could fill in more about the context in which these interpretations are made, it is not going to help us reconcile those conflicting claims because in most of the cases the protagonists are more often than not arguing at cross purposes. To put the problem in a more general way, legal theorists have paid so little attention to the elucidation of this important issue that they could discuss completely different things when they use the term "normativity" or "normativity of law". That is, despite the fact that the term "normativity" is widely used in the contemporary literature, its meaning to a large extent remains unclear and the issue of normativity in legal philosophy is yet to be carefully examined. For example, it is generally understood that the issue of normativity appears in the works of many legal philosophers such as Hans Kelsen, H.L.A. Hart, Joseph Raz, Ronald Dworkin and John Finnis. But it is unclear whether the issue discussed in each of the legal theories has the same connotation, or even denotation. Some scholars use it to describe a particular way of constructing a legal theory while others use it to refer to an essential feature of law as a social institution. Scholars are generally agreed that the issue of normativity is one of the issues in legal philosophy. But they disagree with each other about whether the issue of normativity should play any significant role in our legal studies. But again, it may be that they are both right because they may be arguing about very different things by using the same term "the issue of normativity ".

The main purpose of this part of the thesis is to provide an understanding of the issue of normativity itself, to show why it is indeed a very important issue in legal philosophy, and to suggest how the issue of normativity might be approached.

1. The Meaning of Normativity

The word "normativity" in its most general way is used in the context of norm-guided-activity, such as conforming to, prescribing or following norms. The term "norm" comes from a latin word *norma*, meaning "rule" or "standard". Norm-guided-activity refers to rule or standard governed activity. In this broad sense, any rule-governed or standard-guided activity can be regarded as being normative. For example, solving a mathematical problem by using axioms, writing an essay by following English grammar, playing chess in accordance with certain rules and even cooking a dish by consulting a recipe are all rule-governed or standard-guided activities.[2] As G. Baker and P.

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[2] But the reverse does not hold. That is, a norm-guided activity is not necessarily rule-governed activity. Rules may be understood as a paradigm example of norm. But by no means "rule-governed" and "normative" can be regarded as interchangeable. One of the main reasons that we cannot equate rules with norms is the special problem of the word "norm" used in

Hacker observe,

> The social world we inhabit is made up of normative phenomena. Its very fabric is woven from rules and rule-dependent matter. Law, social and political institutions, morals and mores, economic and relations, languages, logic and mathematics are run through with rules. Much human behavior, at work or at play, in public and in private, is normative.[3]

Generally speaking, human normative behaviors are performed on two different levels. One is conceptual, the other practical.[4] Logic or other pure reasoning is a paradigm case of when a normative act

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prescriptive sense, pointed out by Schauer in his Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life. (Oxford: Clarendon Press, 1991, p.14-5, note 25) According to Schauer, 'norm' is sometimes taken to often refer both to general prescription and to specific commands, and thus "the prescriptive use of 'norm' collapses the particular and the general". For Schauer, it is crucial to make a distinction between the particular and the general of an order or a command before we can start to investigate the nature of rules. This is obviously correct. In this thesis, much of my argument focuses on the prescriptive/normative force of a legal norm. Thus, the ambiguity of the notion of norm will remain as it refers either to a particular court order such as "Mr. Cochran is fined for his contempt to the court" or to a general legal rule "contempt of court will be punished".The following quotations from Baker's and Hacker's book also indicates the equation of "rules" and "norms". Incidently, Schauer and Raz are thought (by MacCormick) to be two philosophers who advance our understanding of the nature of law as a system of legal rules after Hart. But clearly, the fact of their choice of the word either "rules" or "norms" suggests their rather different theoretical focuses on investigating the nature of law.

[3] G. P. Baker and P. M. S. Hacker, Language, Sense and Nonsense - A critical Investigation into Modern Theories of Language, (Basil Blackwell 1984), p.256-7.

[4] Kelsen in the last book of his life discusses two different kinds of norms: one as prescribing for action and the other as prescribing for thinking. He says, "People speak of norms of morality and laws as prescriptions concerning people's behavior towards each other, and in so doing they mean to express the idea that what we call 'morality' and 'law' consists of norms, is an aggregate or system of norms. People also speak of 'norms' of logical prescriptions for thinking." General Theory of Norms, trans. Michael Hartney, (Oxford: Clarendon Press, 1991), p.1, hereafter GTN.

is performed on the conceptual level. Thinking logically can be considered as a normative act for rules of logic are a set of standards and lay down how we ought to think if, for example, we are to preserve truth in reasoning from true premises. Moral behavior can be viewed as a paradigm case of when a normative act is performed on the practical level. Moral behavior is regarded as normative, because it is performed in accordance with a set of moral norms which prescribe how we ought to behave and which promote certain values that lead us to live a good life. However, logical reasoning and moral conduct are two very different kinds of normative activity. They are different with respect to the nature of norms which guide us and to the reasons for which we adopt them. Logic rules (rules of inference) are arguably discovered by logicians and are not free creations of human beings. The normative impact of logic is limited to the conceptual domain in which logical reasoning is required. By contrast, moral norms (again arguably) are intentionally (and/or conventionally) created by human beings, and they in turn have normative impact on our private and social life. The reason for following logical rules and moral norms is also different. We are motivated by epistemic reasons (conceptual clarity) and aim at truth by following logical rules. In the case of following moral norms, we are motivated by practical reasons such as promoting certain values in society or longing for living a better life in society.

The distinction between the conceptual and practical aspects of normativity has some implications in determining the subject matter of jurisprudence. Law as a typical kind of normative phenomenon lives in the domain of the practical. To understand the law as a normative affair we must investigate the practical aspect of law, law as a social institution for guiding our behavior, serving as standards for evaluating others and providing reasons for our actions. I shall come back to this important point again in full detail. For the moment, let's assume that if law is viewed as a normative affair, then legal study must take this practical aspect of law as part of the nature of law.

Despite those differences, logical reasoning and moral behavior are both considered as normative in that their rules or norms are regarded as standard-setting, as providing grounds for evaluation, reason for criticism and correction, and guidance for action. For example, philosophers often articulate arguments in accordance with logical rules and they also use rules of inference to evaluate and criticize each other's work; people usually try to act in accordance with certain moral principles and apply certain moral standards to make moral judgments about how we ought to act in certain situations. In this broad sense, the notion of normativity refers to either a perspective of evaluation (a theoretical activity) or a feature of social practice (a practical activity).

On the one hand, normativity viewed as a perspective of evaluation is a matter of explaining, evaluating and criticizing the object under examination from a normative point of view, namely, in terms of a set of norms. On the other hand, normativity understood as a feature of practical activity is concerned with the prescriptive nature of the social activity in question. Take religion (say, Catholics) for example. The normativity of religion may refer to a particular normative (Catholic) perspective from which certain behavior or conduct is evaluated or criticized. For example, abortion is wrong from the Catholic point of view. The normativity of religion may refer to the binding force of Catholicism which may generate a certain duty or obligation to God. Being a Catholic you should not perform an abortion in any circumstance. The former adopts a religious perspective to approach an issue or to evaluate certain behavior or to view the world, while the latter is concerned with the normative feature and force of religion itself.

These two senses of normativity are commonly used in modern jurisprudential literature: it either refers to a normative approach to the law or the normative nature of law. A normative approach to the law is to explain, criticize, and evaluate law in terms of a set of given norms. The normativity of law means that law by its very nature must be binding and create duty or obligation for people to obey. Law, says Joseph Raz, "is normative in that it serves, and it means to serve, as a guide for human behavior".[5] That is, law is norm-guided activity and binding, and law ought to be obeyed, and law serves as reason for our actions.

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[5] Raz, The Concept of A Legal System, (Oxford: Clarendon Press), 1980, p.3.

These two different meanings of normativity can be understood in terms of a distinction between a theory and its object.[6] A theory of law is a conceptual representation and intellectual understanding of its object - law or a legal system, while the object of a legal theory refers to a real social entity - a legal institution in a society. A theory of law can be either descriptive or normative. A normative theory of law is our theoretical representation of the nature of law from a normative point of view, namely from a given set of norms or standards. Or the nature of law is normatively interpreted, criticized and evaluated. However, the notion of the normativity of law refers to a normative aspect of law such as normative feature, function, quality or the nature of law. A legal system may have many different features, such as coercive, institutional, comprehensive. Normativity is one of them in constituting the very nature of law.

In what follows I shall discuss each of the meanings of normativity in the context of the contemporary debate between legal positivism, natural law theory and critical legal studies. I shall first discuss the meaning of normativity as a characteristic of a legal theory, then I will focus on the meaning of normativity as a feature of law.

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[6] These two different uses of normativity are briefly mentioned by Kelsen when he says that, "there is also a tendency to identify the science of ethics with its objects --- morality --- and legal science with its object --- law --- and to speak of them as "normative" science in the sense of sciences which posit norms or issue prescriptions, instead of merely describing the norms presented to them as their objects." Kelsen, GTN, p.1.

2. Normativity as a Critical Method

John Austin distinguishes analytic jurisprudence from normative jurisprudence. Analytic jurisprudence is concerned with the logical analysis and the basic concepts that arise in law, e.g., rule, duty, responsibility, negligence, punishment, and the concept of law itself. Normative jurisprudence is concerned with the rational criticism and evaluation of legal practice. There are two key differences between analytic and normative jurisprudence: the method and the object of the study. I shall discuss the issue of the method here and leave the issue of the object of the study for Section 4. While analytic jurisprudence is characterized by a value neutral perspective from which the object of analysis is carefully described and explained, normative jurisprudence has gained its characteristics by employing a value-loaded perspective to explain, evaluate, criticize or justify our legal practice. The former is historically associated with legal positivism whereas the latter is traditionally associated with natural law theory.

On the one hand, as Hart suggests, the central task of a legal theory is to provide

> a descriptive and analytical account and explanation of those very legal practices which govern a community's use of force against its citizens ... the positivist's insistence that there is a task and need for a descriptive analytic jurisprudence is salutary even if it is regarded only as a preliminary to the articulation of a justificatory theory of a community's legal practices and not, as it in fact is, a contribution to the study of human society and culture.[7]

On the other hand, Dworkin's theory of law is viewed as a case of normative jurisprudence. As Waluchow notes,

> Dworkinian conceptions of law are thoroughly normative in nature. They are morally charged theories which do not try to describe or characterize what a theorist sees if she takes a morally neutral, detached look at legal systems. They are attempts to justify morally what is observed within the author's own community.[8]

Generally speaking, normative jurisprudence takes one of two forms of normative approach to the nature of law: a content-dependent approach in traditional natural law theory, and a critical method in contemporary Critical Legal Studies (CLS) movement. Let's start with the CLS.

In the context of the CLS movement, normativity refers to the legal theorist's perspective from which law is criticized and reconstructed. In a recent symposium on "The Critique of Normativity", Margaret Radin and Frank Michelman claim,

> ...... the field of legal thought contains - arguably - not one

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[7] Hart, Issues in Contemporary legal philosophy, ed. Ruth Gavison, (Oxford:Clarendon Press, 1989) p.37.

[8] Waluchow, Inclusive Legal Positivism, (Oxford: Clarendon Press, 1994), p.15.

> normativity, but many normativities. The styles of legal scholarly activity that currently and colloquially fall under the heading of normative legal thought are diverse and in some respects incompatible. A partial listing, contrived for our own purposes here, would include the normative jurisprudence of autonomous doctrinal elaboration ("the artificial reason" of the law), instrumentalist economics, rights and principles, dialogism, poststructuralism, pragmatism, feminism, and critical race theory.[9]

Normativity in this context is understood as a legal scholar's value-loaded perspective in criticizing law in general and a legal system in a given society at certain historical period. Since each theorist has a particular value-loaded perspective to diagnose the problems of the current legal systems and prescribe the future of law, there are many normativities of legal theory. For example, a Marxist would view the rule of law in United States as a pernicious sham masking the dark forces of class oppression, and find little redeeming value in legal practice. A radical feminist would argue that current legal practice signifies the institutionalized dominance of men's value over women's.

Despite the difference between them, the central question for CLS is, "What should we do? What should law be? What do you propose? ... asks normative thought."[10] Normative legal thought is thus viewed as the adoption of a particular point of view (an ideology or a value system) to criticize and reproach current legal systems.[11] Jurisprudence is regarded as ideology which reflects certain social values or class interests. The ultimate purpose of jurisprudence is to be viewed as a clinical science which diagnoses the problem of a given legal systems and then prescribes political treatments or prescriptions for the malfunctioning legal system in a given usually ill society. A legal theorist may take "the trial of the century"[12] as a typical example to illustrate the corrupted nature of the current legal system in the United States and how the essence of law is raped by a high priced team of lawyers under the name of justice.

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[9] M. Radin and F. Michelman, "Pragmatist and Poststructuralist Critical Legal Practice", University of Pennsylvania Law Review, Vol. 139, 1991, p.1023-4.

[10] Schlag, "Normativity and Nowhere to Go", 43, Stan. L. Rev. (1990), at 177; "Normativity of Political Form", U. Penn. L. Rev. Vol. 139, 1991, at 835-39.

As Pierre Schlag describes, the only intelligible way to make sense of normative legal thought is that, "normative thought can be understood to aim at the recommendation or prescription of a particular course of action."[13] It is not just that legal scholars should examine law from a normative perspective but also that legal scholarship should be aimed towards promoting certain moral, political and ideological values.[14]

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[11] M. Radin and F. Michelman summarize some of the characteristics of normative legal theories in the following, "to set up rationalistic, monistic "grant theory" - rigged of abstractive-deductive reasoning; armed with compulsive moralizing prescriptions; girded by moral complacency, defensiveness, and self-enclosure; and anchored in intellectual naivete - as the paradigm of problematically normative legal thought." "Practical Legal practice", p.1020. In the paper, they legitimately express their greatest doubt whether this particular use of "normativity" will be helpful as part of the effort to advance an understanding of the movement of legal theory. This paper is particularly interesting in the sense that they, from a point of view of critical practitioners, complain of the ambiguity of "normativity" used in the current CLS movement.

[12] People vs. O.J. Simpson.

The normative approach to law represented by scholars in CLS is a radical movement in the sense that it goes far beyond the traditional topics in legal theory. Instead of giving a descriptive analysis of the concept of law (legal positivism) and offering a moral evaluation or justification of legal practice (natural law theory), scholars in CLS try to examine and criticize our legal system in terms of its broad social ideology, such as political, economic, racial, cultural, moral and social roots. In some sense, the normative nature of law and the normative perspective of legal scholars are both products of a given social ideology. It is the dominant ideology which determines both the nature of law and the perspective from which a legal scholar can criticize and evaluate law. Clearly, jurisprudence in this sense collapses into a higher theory of ideology and jurisprudence is an ideology. No wonder that in contemporary jurisprudence there is a growing concern whether the CLS movement is an authentic school of legal study, or just a critical social theory of law. If legal study is just a matter of criticizing the current legal system from a particular ideological viewpoint, then the very existence of jurisprudential study needs to be justified. In other words, normativity as a critical method would not provide a useful conception of law itself. It can only offer us a particular view of what underlying values law may present from a normative point of view. The immediate difficulty is not only whether it is possible for us to have some sort of objective understanding of the nature of law, but also whether all those critics with radically different normative perspectives could have any productive conversations among themselves in the first places. In a sense, there may exist no common object of legal study among those critics (although they may have certain common agenda). Consequently, we may have no way to compare and evaluate their theories, nor their diagnoses of the problem in a given legal system, nor their prescriptions for future reform of a social institution. Or even ironically, the issue of normativity will disappear in legal study. As Schauer reminds the audience in the same symposium "The Critique of Normativity", if normativity is used in this peculiar sense, then the issue of normativity should not be treated as a dominant part of legal scholarship. He says,

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[13] P Schlag, Normativity and Political Form, p.811.

[14] It becomes one of the central issues in CLS that what sort of the values or ideology they shall promote. Mark Tushnet, in his "The Left Critique of Normativity: A Comment", claims, "Three of the authors of the principal articles - Pierre Schalag, Richard Delgado, and Steven Winter - are associated with the left in the legal academy, and their political sympathies are clear in the articles they published in the symposium. But being on the left means having some normative position. So how could they offer a 'critique of normativity' as such?" Michigan Law Review, Vol. 90, p.2326. Tushnet argues that the critique of normativity conducted by those critics are really limited by their left normative positions. He then offers some social-psychological explanation of the reasons as to why the critics have accepted these particular normative or political positions. Finally, he suggests that instead of committing some sort of left position, these critics may look at some alternatives, such as social democracy, pragmatism, or even Roberto Unger's theory of destabilization rights. What I suggest here is that despite Tushnet's criticism of Schalag's, Delgado's and Winter's views, there is a striking similarity between what he calls 'left critics's approach to normativity' and Tushnet's own project. Both parties focus on the issue of legal scholarship and they employ the same method: first diagnose the problem and then prescribe the treatment. But the interesting part in Tushnet's case is the following. On the one hand, Tushnet diagnoses the problem of the left critics inherited in their dispositional political values (a normative approach). On the other hand, his treatment of the problem is rather mixed. It seems that when he prescribes another alternative set of normative values, democratic and destabilization rights, he also suggests that a more broad approach, such as philosophical pragmatism, may be needed.

> because normativity, in the sense of legal scholarship that attempts to persuade some participant in the legal system - such as a judge, lawyer, or legislator - to act in one way rather than another, is now so much the norm, there is a risk of forgetting that the norm of normativity is contingent and not inevitable.[15]

Despite these theoretical implications, in practice we do see some sound criticism of law in the current CLS movement. One possible explanation is that those critics do understand the nature of a legal system. Or more generally, a sound critical reading of law must presuppose an analytic understanding of the nature of law. Thus a good critic must be first a legal positivist, or, at least, rely on the findings of legal positivists. To take one of the leading critics as an example, Duncan Kennedy in his famous essay severely criticizes the foundation of modern contract law.[16] Kennedy starts with a careful analysis of the conflict of legal form - the nature of rules versus standards. It is his analysis of the over and under inclusive nature of legal rules that reveals the contradiction of legal substance - individualism versus altruism, which finally leads to two radically different versions of ideology. Although his criticism and evaluation are guided by certain normative principles - at a deep level there are always moral and political values behind formal features of a legal system - Kennedy's diagnosis of and prescription for modern contract law are based on his initial analysis of the formal quality of legal rules. If anyone is in doubt about Kennedy's analytic work on the nature of legal rules, she may make a comparison between his analysis and Schauer's discussion of the nature of rules in life and in law. I consider the latter as a genuine piece of positivistic and analytic work.[17]

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[15] Schauer, "The Authority of Legal Scholarship", Univ. Penn. L.R. vol. 139, at 1003. For Schauer's own view on the issue of normativity, please see last section of Part I.

[16] D. Kennedy, "Form and Substance in Private Law Adjudication", 89, Harvard Law Review, p.1685-1778.

If this charitable reading of the normative method in CLS could hold water, then it suggests that normativity as a critical method can be compatible with the mainstream jurisprudence with either one of the following two qualifications. It may start with an analytic understanding of the law as it is without imposing some pre-programmed value system upon a theorist's observation of the object under investigation. As Schauer suggests, we may take a content-independent approach to the issues of following a rule, obeying the command of a superior, or obedience to authority.[18] Or alternatively, the moral and political values from which a critic criticizes law must be directly relevant to the content of law or be derived from the moral or political foundations of law. The first option is understood as a positivistic thesis - a value-neutral approach to the analytics of law. The second option is regarded as a naturalistic thesis - a content-dependent approach to the substance of law, which we now examine.

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[17] See Fred Schauer, Playing by the Rules : a Philosophical Examination of Rule-Based Decision-Making in law and in Life, (Oxford: Clarendon Press, 1991), Chapters, 2, 3, 4, 5. Incidently, Neil MacCormick also share this view, in a very recent paper. He thinks that Schauer and Raz are two legal positivists who advance our understanding of the nature of rules since Hart.

3. Normativity as a Content-Dependent Approach

A content-dependent approach has been traditionally associated with natural law theory. According to the classical doctrine of natural law theory articulated by St. Thomas Aquinas, human laws are understood as deriving their proper content from certain natural laws, such as justice and natural rights. Aquinas tells us,

> As Augustine says, that which is not just seems to be no law at all. Hence the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just from being right, according to the rule of reason. But the first rule of reason is the law of nature. Consequently, every human law has just so much of the nature of law as it is derived from the law of nature. But if at any point it departs from the law of nature, it is no long a law but a

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[18] See Schauer, "Authority of Legal Scholarship", Univ. Penn. L. Rev. Vol. 113 (1991), at 1005; "Constitutional Conventions", Mich. L. Rev. Vol. 87 (1989), 1407; "Judicial Self-Understanding and the Internalization of Constitutional Rules", Vol. 61 (1990), Univ. Colo. L. Rev. 749.

perversion of law.[19]

Three keys ideas are expressed in this passage. First, human laws (moral or legal) are based on natural laws, which are the most fundamental laws in the human world and which are knowable to human reason. Second, the very status of law is essentially validated by value-loaded natural laws, rather than by certain social or institutionalized sources. Third, the normative force of law depends on its justice rather than its enactment and enforcement by socially institutionalized authorities. Let's characterize these three points as the content of law, the identification of law and the normative force of law. In this classical version of natural law theory, these three ideas are closely connected with each other. If law derives its content from natural laws, then it is validated by natural laws and it derives its normative force from natural laws. Consequently, we must take this content-dependent approach to understand the foundation, the existence and force of law.

The classic version of natural law theory is hard to find in contemporary literature, especially the view "an unjust law is not a law". However, some of the key ideas expressed by Aquinas continue to be important issues debated today. MacCormick summarizes that the very first issue discussed in the contemporary debate between legal positivism and natural law theory is whether "law can be explained, analyzed, and accounted for in terms independent of any thesis about moral principles or values".[20] To use our terminology, given that what law expresses may indeed be value-laden, should these fundamental values in turn become a set of standards in terms of which positive laws are to be described and explained in order to count as laws? Or to put the question slightly differently, is it necessary for a legal theorist to take a content-dependent approach to understand the normative nature of law? A content-dependent approach is understood here as a normative approach from which the nature of law is explained in terms of a set of moral values, which are supposedly contained in the content of law. In other words, the way in which we interpret the nature of law as law and in which we explain the nature of legal practice is pre-determined by what law has expressed in its content. Since the content of law is value-laden, an interpretation of law must be normative.

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[19] Aquinas, Summa Theologica, Question XCV (Human Law), 2nd Article (Whether Every Human Law is Derived from the Natural Law?).

For Dworkin, it is no accident that we have to take a normative approach to law. Each theorist's choice of an interpretative conception "must reflect his view of which interpretation proposes the most value for the [object of legal theory] - which one shows it in the better light, all things considered."[21] More explicitly, Dworkin claims, a legal theorist must, by the very logic of interpretation,

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[20] MacCormick takes this issue as the very first issue debated between natural law theory and legal positivism. See "Natural Law and the Separation of Law and Morals", in Natural Law Theory, ed. Robert George, (Oxford: Clarendon Press, 1992), p. 107.

> use the method his subjects use in forming their own opinions about what the legal practice requires. He must, that is, join the practice he proposes to understand; his conclusions are then not neutral reports about what [the participants] think but claims about the practice competitive with theirs.[22]

At first glance, Dworkin merely suggests that the nature of law must be understood from a participant (insider) point of view. That is, law essentially is not an abstract concept but a lively social practice, and a legal theorist, by taking the stand of the participants, understands what law requires to be interpreted and then forms her perspective of interpretation. However, to figure out what exactly is the participant's point of view, we must go a further step to ask the question of what Dworkin understands as the purpose of legal practice from the point of view of participants. According to Dworkin, the very purpose of legal practice is to provide a moral or political justification of state coercion.[23] Given this purpose of legal practice from a participant point of view, what underlies legal practice normally must constitute a value-loaded perspective from which a theorist normatively tries to make the data under investigation morally and politically "the best it can be".[24]

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[21] Ronald Dworkin, Law's Empire, (Harvard University Press: The Belknap Press, 1986), p. 52-3.

[22] ibid. p. 64.

[23] Dworkin says: "A conception of law is a general, abstract interpretation of legal practice as a whole. It offers to show that the practice in its best lights, to deploy some argument why law on that conception provides an adequate justification for coercion." ibid. p. 139.

By applying Dworkin's concept of law, either the underlying value contained in the law constitutes the perspective of the theorist's interpretation of the legal practice, or as Schauer describes, Dworkin would maintain that,

> legal decision-makers in the United States can and do decide cases according to an undifferentiated set of (technically) legal, political, social, and moral sources. And if this is so, then morality is inextricably a part of every legal decision, and moral inspection a necessary condition for every application of law.[25]

If this is the case, the theorist is somehow obligated to make the best sense of legal practice even though the coercion imposed by the law cannot be really justified by political morality. But this is obscure. Or alternatively, as Schauer argues, if one can disregard law in the service of morality, "then saying that there is a moral obligation to obey the law is equivalent to saying, tautologically, that there is a moral obligation to be moral."[26] But this is trivial.

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[24] It is very hard in my brief discussion to do justice to Dworkin's interpretive method presented in his two books, Taking Law Seriously and Law's Empire. However, the issue I am concerned here may be not a complicated one. I am not the only one who attribute Dworkin's interpretive method as a normative one. Waluchow in his ILP has a good discussion on Dworkin's method of interpretation. He says, "it is quite another [thing] to suggest that we should deliberately permit our moral values and beliefs about the justification of state coercion to shape how we understand a social practice like law. And it is precisely this that Dworkin would have us to do." p. 17. Also see Shiner, NN, p. 220-230.

[25] Schauer, "The Question of Authority", The Georgetown Law Journal, Vol. 81, 100.

Although Schauer criticizes Dworkin's version of natural law theory, his criticism has some wide implications. The question we are interested in is, Shall we take a normative approach to the issue of law's normativity? In the following I shall argue that a content-dependent approach may also be either obscure or trivial in dealing with the issue of the normativity of law.

One might think that normativity as a problem in legal theory is adequately dealt with by a normative approach practiced in natural law theory. Raz points out, "much of the motivation to endorse natural law theories derives from the belief that they provide the best explanation of the normativity of law".[27] The central characteristic of a normative approach is the presupposition that laws are validated and justified by their underlying moral and political values. This seems nicely to explain why normative terms are used in legal statements and normative statements in legal decision. For natural law theory, the question of the normativity of law is an issue of justifying the normative force of legal decisions.[28]

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[26] ibid.

[27] Raz, Practical Reason and Norms, (London: Hutchinson 1975), p.169.

[28] As Shiner points out, for natural law theory, "the fact that a particular decision is required by the institutional rules of a legal system has nothing at all to do with whether the decision is justified." Shiner, Norm and Nature - The Movement of Legal Thought, hereafter NN, (Oxford: Clarendon Press, 1992), p.186. The validity of a legal decision is derived from a set of

But that is not true. Under the content-dependent approach, while the normative force of a law (e.g., making theft a crime) seems to be easily explained (theft is morally wrong), that is not an explanation of what is the special normative force of law against theft, as distinct from the normative force of the moral injunction against theft. A normative approach assumes that the very nature of law is based on its background political morality. An approach which reduces the normativity of law to the normativity of the background values law instantiates isn't really a theory of the normativity of **law**. In other words, when it comes to the issue of the normativity of law, a normative approach by its very assumption identifies legal normativity with moral normativity. Under this theoretical framework, since the normative force of law is justified in terms of its moral defensibility, no interesting issue about the normativity of law can be articulated and there is no theoretical significance in asking how and why law is normative. The issue of law's normativity disappears in a normative approach in the first place.

It is in this sense that if a normative approach is adopted, any attempt of investigating the normativity of law cannot even "get off

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institutional rules whereas whether the derived rule has its normative force depends on whether it is morally defensible. David Lyons in his "Derivability, Defensibility and Justification of Legal Decisions" draws our attention on the distinction between derivability and defensibility. If derivability is a sufficient condition for legal validity, then it is only a necessary condition for legal normativity. What makes a legal decision is normatively forceful is the notion of defensibility. Only when a legal decision is morally defensible, its normativity is justified.

the ground". The paradigm questions for raising the problem of normativity in legal theory are, Ought we to obey a legally valid but morally iniquitous rule? Why do morally unjust and unjustifiable laws have some normative force? Can law be normative without being morally prescriptive? Can the bindingness of law be explained without reference to moral considerations? Questions of this sort cannot be asked in the first place and therefore the issue of the normativity cannot be even raised within the natural law tradition.[29]

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[29] According to natural law theorists, there is not a potential but actual danger for a legal positivist to take on the issue of normativity of law in articulating a legal theory of law, for regarding normativity as part of the nature of law is internally inconsistent with the very project of legal positivism. Beyleveld and Brownsword, in their "Normative Positivism: The Mirage of the Middle-Way", give us two examples in the history of legal thought. They claim that both Hart's legal realism and Kelsen's legal idealism have failed, not because of their legal positivism but because of their incoherent normative positivism, meaning their taking on the issue of normativity of law. In their article, they examine each of Hart and Kelsen's theories by picking out its positive element and its normative component. Through the comparison of these two elements in each theory, they conclude that normative positivism is internally incoherent. I will not rehearse their lengthy arguments here. The crucial part for their argument, which is relevant for my purpose, is the criteria by which the positivist or normative elements can be classified. The criteria for picking up normative elements they used in both cases, Hart and Kelsen, is what they called "The Legitimation Thesis". A legitimation thesis "is that it is morally legitimate to posit the rules for enforcement". When Kelsen and Hart within their positivistic framework raise the issue of normativity, law as "coercive normative orders" (Kelsen) or law as "an affair of obligation" (Hart), according to Beyleveld and Brownsword, they have already committed a middle way of synthesizing two incompatible theses - laws as legally valid rules and laws as moral judgments. The project of searching for a normative nature of law becomes a project of adopting the legitimation thesis within the positivistic framework. This signifies that Kelsen and Hart surrender themselves to the morality thesis. A positivist theory of law in nature is incompatible with the morality thesis. Beyleveld and Brownsword conclude, "One can combine the legitimation thesis with a pseudo-separation thesis, or the separation thesis with a pseudo-legitimation thesis, but not the legitimation thesis with separation thesis." Their conclusion is that normative positivism is "terminally contradictory". As I mentioned earlier, Goldsworthy also argues that "taking on the issue of the normativity of law will lead the self-destruction of legal positivism". For both references, see note

What is going wrong with a normative approach either as a critical method in CLS or content-dependent method in natural law theory is its evaluative nature. It is the loaded values entailed in a normative approach that precludes legal theorists from understanding the distinctive normativity of law. The law is, in Raz's terms, "an institutionalized normative system".[30] And so its normativity is going to be an institutionalized normativity. A legal theorist must pick the meaning of law from a pre-theoretical usage and "seek to identify law on the basis of non-evaluative characteristics only."[31]While the issue of the normativity of law does not arise as a problem for natural law theory, it does raise as a problem for legal positivism, since emphasis on the distinctive character of law vis-a-via morality is a mark of legal positivism, and moreover since positivism is so concerned to give a value-free account of the nature of law. I shall give further explanation of why this is so in section 5. But first let's explain how normativity is

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[30] Raz says: "Many, if not all, legal philosophers have been agreed that one of the defining features of law is that it is an institutionalized normative system." AL, p.105.

[31] John Finnis, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1981), p. 9. Hereafter NLNR. Shiner also draws our attention to this point as well. He says: "Any attempt to analyze law must not only include, but also begin with, the entities picked out in the pre-analytic recitation, and therefore the entities emphasized by positivism. If the theorists strayed so far from positivism that she presented a theory the vocabulary of which refers to none of the entities to which the vocabulary of positivism refers, her theory would not be, and could not be, a theory of law." NN, p.9.

understood as the object of legal study.

4. Normativity as the Object of Legal Theory

So far I have discussed the notion of normativity understood as a method of evaluation in the context of CLS and natural law theory in the last two sections. The meaning of normativity is also understood as a feature of social practice - the normativity of law. Let's start with an ordinary example of normative activity - playing tennis.

> A story is told of a Chinese mandarin passing through the foreign legations' compound in Beijing. Seeing two of the European staff playing an energetic game of tennis, he stopped to watch. Bemused, he turned to a player and said, 'If it is, for some obscure reason, necessary to hit this little ball back and forth thus, would it not be possible to get servants to do it?'[32]

Playing tennis here is regarded as a rule-guided activity. The question we face here is how to respond to the question asked by this mandarin. Obviously it is not enough to satisfy the mandarin's curiosity if we just lay out the rules of playing tennis, the structure of tennis as a game, the existential conditions of tennis as a form of exercise. Those indeed are very important facts about tennis, which differentiate tennis from other entertaining or athletic exercises. The question here is, Do those facts reveal the nature of tennis as a form of exercise? No. These facts about tennis may give the mandarin some knowledge about what it is, and how it is different from other activities. But the original question he had in mind still remains unanswered. To answer his question, we must go a step further to explain the practice of playing tennis, for examples, what the point, reason and purpose of this rule-guided activity, playing tennis is. This practical aspect can only be explained in terms of a broader perspective, such as the point of view of the persons participating in the practice of tennis, the justification for having those rules and reasons for following those rules, the purpose of engaging in this activity, and the function and value of playing tennis, etc. This story suggests that a norm-following activity can be viewed from two aspects: a factual aspect which may identify what it is and a practical aspect which explains the nature of the activity. A complete understanding of the nature of tennis as a form of exercise must include an explanation of the factual aspect of tennis and the practical aspect of playing tennis as well.[33]

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[32] Baker and Hacker, Language, Sense, and Nonsense, p. 246.

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[33] Much of the philosophical discussion of normativity was influenced by the anti-essentialist spirit of modern analytical philosophy and in particular by its tendency in the beginning of this century to regard all philosophical questions as linguistic questions. Language has been understood as a matter of rules and linguistic activities are regarded as rule-guided or normative. The nature of language is understood in terms of the role the rules play in our linguistic activities. To explain the normativity of language is to investigate rules governing our linguistic practice. Frege first proposed that logic is a normative science. The rules of logic, according to Frege, are necessary rules which guarantee our correct linguistic practice. He says. "they are boundary stones set in an eternal foundations, which our thought can flow, but never displace." B. Russell and early Wittgenstein articulated a radical conception of language as a calculus of meaning rules. All meaningful sentences are analyzable into truth-functional combinations of atomic

The example of tennis is not meant to serve as an argument by analogy here, since there is a substantial difference between tennis as a form of exercise and a legal system as a social institution. The story here only suggests that there is a difference between knowing the meaning of tennis and understanding the nature of tennis. The former has something to do with the factual aspect of tennis while

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sentences, which are composed of unanalysable names in grammatical coordinations. Linguistic activity is nothing but logic-syntactical rule-governed activity. Inspired by modern development of quantificational logic, D. Davidson attempt to explains the valid inference patterns (syntax of logic) by reference to rules of logical semantics. The validity of a syntactical rule is supported by its semantic rule. N. Chomsky believed that the normative function of language has its deep grammatical root. The grammar of language is a set of rules that determine the normal use of language. The grammatical structure of language, however, is predetermined by the biologically given organization of the mind. Thus, linguistic activity as a rule-governed activity may only be explainable from cognitive psychology.

When the normativity of language is understood in terms of its logic, its syntax, its semantics, or the deep structure of its grammar, the issue of normativity of language is reduced to the issue of the formal structure of language. Baker and Hacker complain,

> For according to these views, rules are capable of existing unbeknownst to those who follow them. We can, it seems, discover that we have been following hidden rules. Speech, on this conception, is governed by rules irrespective of speakers' ability to cite the rules they are following or of the fact that they do not explain what they mean by semantic rules that assign meaning to what they say. (ibid. 248)

The problem here is not whether there are deep structures of language underlying human linguistic practice. Rather the issue in question is whether the normative nature of language can be explained only in terms of a formal property of language, and whether the normativity of language can be understood without paying any attention to the context in which the agents practice. Recognizing the problem of a formalistic approach to the nature of language, late Wittgenstein maintains that the meaning of language exists in its use and the normative function of language lies in its context of practice. The deep thought suggested by Wittgenstein is that the issue of normativity is not a pure question of theoretical investigation, but a matter of social practice. Normativity as a feature of social practice cannot be explained only in terms the structure of rules and norms which may govern our practice.

the latter is concerned with the practical aspect of playing tennis. If this idea is sound, we are ready to introduce two pairs of distinctions in jurisprudence: one is the distinction between the factual aspect of law and the normative aspect of law, and the other is the distinction between understanding the meaning of the concept of law and understanding the nature of a legal system.

Law as a rule-guided activity can be viewed as having two aspects: factual and normative. Any foreign traveller in Canada, for example, can learn Canadian law as they can know the Rocky Mountains or West Edmonton Mall. They can learn some facts about the existence of the Canadian legal system (facts such as there is no capital punishment in Canada), facts about the behavior and intentions of officials within the legal system (such as legislators in assenting to statutes and judges in deciding cases), and facts about the effectiveness of law (most people, if not all, obey the law). Obviously, none of these facts can explain why law purports to declare what people ought to do, how and why laws guide people, what their rights and duties are, whether law ought to be obeyed and whether law generates obligation on its people. This is the practical or normative aspect of law. Gerald Postema claims,

> The notion of law is essentially practical. Law lives in the familiar environment of 'right', 'obligation', 'reasonableness', and their cognates, all of which derive their distinctive character from the role they play in the

practical deliberation and guidance for rational agents.[34]

Legal judgments are judgments of what others ought to have done or ought to do; legal decisions based on those judgments are decisions to act; the purpose of legal reasoning by which legal judgments and legal decisions is to justify action; legal rules are mandatory rules which prescribe what people must do and ought to do. Obviously the normative consequences of legal judgement, rule-based decision-making and legal reasoning are enormously practical. They affect reputation, property, liberty and they may even take human life itself. Raz discusses two aspects of a legal statement when he describes Hart's theory.

> This [Hart's] view of legal systems is meant to accommodate both their social-factual and normative aspects. The factual aspect is captured by a truth conditional analysis. The normative one is accounted for by an explanation of the illocutionary force of the statements and the fact that they express not only the speaker's beliefs but also his practical attitude, his willingness to be guided by certain standards.[35]

It is important to remember that the factual and normative aspects are only two conceptually separated aspects of law. In social reality a legal system must have these two aspects at the same time. When we say that the existence of law can be identified through its factual aspect, by no means do we claim that the nature of law can be understood without an account of the normative aspect of law.

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[34] G. Postema, "The Normativity of Law", Contemporary Issues of Legal Philosophy, (Oxford: Clarendon Press, 1989), Pp.81-104, at 81.

[35]. Raz, "The Purity of the Pure Theory", in Essays on Kelsen (Oxford: Clarendon Press, 1986), 86.

Michael Moore in a recent paper tries to make this point. He makes a distinction between describing law and describing a social concept of law.[36] According to Moore,

> Most often descriptive general jurisprudence adopts a conventionalist theory of meaning in its quest to analyze law. A conventionalist about meaning believes that words like 'tiger', 'malice' and 'law' refers to their respective things in the world only via a conceptual intermediary.[37]

For example, what determines what the word "gold" refers to - gold - is our concept of gold. Thus there are three things under this theory of meaning: gold, the thing; 'gold', the word; 'gold' the concept. Applying this theory of meaning, one studies the nature of law by studying the concept of law. "On this view of meaning general jurisprudence becomes a study of 'the concept of law' or 'the concept of a legal system'."[38] Just as a concept of gold takes the form of a list of criteria for a thing to be gold, such as "yellow, precious, malleable, metal", a concept of law takes a form of a list of criteria for something to be law, such as "coercive, institutional, and a finite set of rules validated by the rule of recognition." In contrast to the conventionalist theory of meaning, there is a theory of direct reference, according to which "law' simply refers to a legal institution in a society without the third thing intervening. "The meaning of 'law', on this theory, is given by the nature of the thing referred - law - and not by some concept of law that fixes (by linguistic convention, or analytic necessity') what can be law."[39]

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[36] Michael Moore, "Law as a Functional Kind", in Natural Law Theory: Contemporary Essays, ed. Robert George, (Oxford: Clarendon Press, 1994, p. 188-242.

[37] ibid. 204.

[38] ibid.

Raz's early work, The Concept of A Legal System, is a very good example, I think, of using the conventionalist theory of meaning to analyze the nature of law through a concept of a legal system. The concept of a legal system takes the exact form of a list of criteria of what counts as the qualities of law as law and how to identify them. Raz claims, "From an analytic standpoint a complete theory of legal system consists of the solutions to the following four problems."[40] He summarized these problems as follows (1) The problem of existence: What are the criteria for the existence of a legal system. (2) The problem of identity and membership: What are the criteria which determine the system to which a given law belongs? (3) The problem of structure: Is there a structure common to all legal systems, or to certain types of legal system? (4) The problem of content: Are there any laws which in one form or another recur in all legal systems or in types of systems? By answering these questions, Raz provides an understanding of the factual aspect of the concept of law or a legal system, such as how a legal system is identified, what the existential conditions of a legal system are, what the relationship among various rules and what the formal qualities and structure a legal system has. However, a legal theory based on answering these questions wouldn't give us much help to the questions of how law is normative, why law ought to be obeyed and why people do use normative language in talking about law. As Raz himself realized at the end of his book,

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[39] ibid. 205.

[40] Raz, The Concept of A Legal System: An Introduction to the Theory of Legal System, Second Edition, (Oxford: Clarendon Press, 1980), p.2.

> One major lacuna in the conception of the task of legal philosophy presented in the Introduction is the absence of any reference to the explanation of the normativity of law as an independent task.[41]

The point I want to emphasize is this. We can make a distinction between a theoretical concept of law and a practical concept of law. A theoretical notion of law is a conceptualization of the factual aspect of law understood as a list of criteria by which legal rules are validated and the existence of law is identified. Under this theoretical concept of law, the issue of whether something is law is solely determined by whether it has the appropriate source in legislation, judicial decision or a rule of recognition, a matter of pure social fact which can be established independently of any legal practice or normative considerations. Law is abstractly conceived to be an autonomous system with certain unique qualities, i.e, definite relationships among its legal rules, a certain formal structure and a set of existential conditions of a legal system. A practical concept of law is an understanding of the practical aspect of law as an institutionalized normative system in social reality. Under this practical concept of law, law identified by its unique social source also has its distinctive normative/institutional force - requiring its subjects to obey, generating obligation on its subjects and providing practical reasons for its subjects for action.

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[41] Raz, The Concept of A Legal System, 2nd Edition, (Oxford: Clarendon Press, 1980), p.230. Raz's account of the normativity of law largely appears in his other three books, Practical Reason and Norms, hereafter PRN, (New Jersey: Princeton University Press, 1990), The Authority of Law, hereafter AL, (Oxford: Clarendon Press, 1979), The Morality of Freedom, hereafter MF, (Oxford: Clarendon Press, 1986), in which as he claims that he pays much more attention to the concept of law in social practice.

If this distinction between the theoretical and practical concepts of law holds water, then an adequate understanding of the nature of law should include an account of both the factual and the normative aspects of law.

5. The Problem of the Normativity of Law

Laws guide our behavior, and they serve as a standard for evaluating people's conduct and they provide us reasons for action. Law as a social institution is understood as a normative enterprise which attempts to regulate social conduct by bringing social pressure to bear upon persons to behave according to specified legal rules. Legal statements are characteristically used to set out what is required, prohibited, permissible, normatively possible according to law. Contemporary legal theorists who argue about the nature of law generally do not dispute the assertion that law is a normative phenomenon. What they disagree about is whether an account of law's normativity should be part of a general theory about the nature of law and what exactly this assertion of law's normativity amounts to, that is, how and why law is normative. It is these two issues that occupy the center of contemporary debate among various schools of legal thought and that constitutes the real challenge for contemporary legal positivism. In the rest of this section I shall examine the first issue and I shall devote the rest of my thesis to the second issue.

Waluchow claims,

> Much of the current confusion within general jurisprudence results from differences of opinion concerning (a) what it is exactly that one is supposed to be doing in offering a theory of law, and (b) what it is that one's opponents are doing in articulating their theories of law.[42]

The first issue here is the issue of the subject-matter of legal theory and the second is the issue of methodology of legal study. According to Waluchow, Dworkin's mistake is his confusion of these two issues in his conception of law. In Dworkin's theory of law, his method of normative interpretation determines his notion of law as integrity. The normative perspective of an interpreter is determined by the underlying moral value of law which in turn provides a foundation for a legal theorist to make the best moral sense of law he can. Waluchow's criticism of Dworkin's theory of law provides a very good example of how a normative approach - a content-dependent approach and a critical method - is deficient in jurisprudential study.

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[42] Waluchow, ILP, 4.

What makes Waluchow's criticism of Dworkin's theory special is his determination to dig out some sort of deeper theoretical foundation for Dworkin's methodological mistake. Waluchow thinks that Dworkin has confused three distinctive theories of law: theories of law, theories of adjudication, and theories of compliance. Waluchow says, "Dworkin in effect collapse these three into one, and this leads him to highly counter-intuitive consequences".[43] According to Waluchow, a theory of law should exclusively concentrate on the issue of the grounds of law, which is regarded as the criterion of identifying and validating propositions of law. This is the proper task of legal theory and this is what most prominent legal philosophers do. He says, "legal positivism suggests that the grounds of law are exhausted by a finite set of rules validated by the will of the sovereign (Austin and Bentham), a chain of validity culminating in a presupposed "Grundnorm" (Kelsen) or a socially constituted, master rule of recognition (Hart)."[44] Thus, the proper subject matter of legal theory should be a conceptual analysis of the grounds of law and the existing conditions of a legal system.

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[43] ibid. 6.

[44] Waluchow, ILP, 9.

Parallel to his list of legal positivist accounts of the concept of law (the will of the sovereign, the ground norm and the rule of recognition), Waluchow also points out that what ties natural law theorists together is their common consideration of the normative nature of law as the subject matter of legal theory. For example, Dworkin takes what we see in legal practice as part of the subject matter of a legal theory; Fuller's "definitions of what law really is are not mere images of some data experiences, but direction posts for the application of human energies"[45]; Philip Soper even openly proposes the fundamental jurisprudential question as the one of "What is law that I should obey it?" For Waluchow, in viewing a legal system as a social practice and in asking questions about the normative nature of law, we have already gone beyond the domain of a theory of law. A jurisprudential inquiry into the normative nature or practical aspect of law will inevitably become a moral judgment of law and a moral theory of law. Waluchow claims,

> As a consequence, a legal theory cannot be a morally detached, neutral essay in descriptive sociology. In attempting to interpret law in such a way as to explain why normally it really does justify state coercion one simply must exercise moral judgment.[46]

Waluchow may be right about the ultimate mistake made by Dworkin and Soper. Dworkin seems to claim that unless a legal standard is such that judges should be enforcing it, and that citizens should conform to it, it is not a legal standard. Soper seems to claim that the nature of law cannot be explained unless the issue of obedience of law is considered and a general moral or political obligation to obey law is fed into the issue of what is law. That is, Dworkin collapses all three theories into his theory of adjudication and Soper collapses three theories into his theory of compliance (his theory of political obligation).

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[45] Fuller, "Fidelity to Law: A Reply to Professor Hart", p.83

[46] ibid. 16.

However, behind his critique of Dworkin's theory, Waluchow proposes a much more general agenda about the domain and the subject matter of a legal theory. According to Waluchow, a legal theory must limit its domain within the issue of identification of law and the issue of the enforceability/normativity of law (or the institutional or normative force of law) must be excluded from the subject matter of a legal theory. He says,

> If the preceding arguments are sound, we have good reason not merely to acknowledge the 'separation of law and morals'; we have reason also to respect a conceptual separation between the law and the legal-adjudicative powers and obligations of judge, i.e. the conceptual separation of law and its institutional force over judges' decisions.[47]

I think that Waluchow's criticism of Dworkin's theory shows us how a normative approach to law from the perspective of theories of adjudication can go wrong. However, it does not follow that a legal theory should exclude the issue of the normativity of law or the proper subject matter of a legal theory must be the issue of identification of law. It is one thing to claim that some natural law theorists fail because they explain the nature of law in terms of the normative aspect of law or by using a normative method. It is quite another to say that a theory of law should exclusively focus on the issue of identification of law without accounting for the normative nature of law or that the nature of law can be understood without understanding its normative aspect. I am not denying that the normative aspect of law can be partly explained by what Waluchow proposes as the contingent role morality plays in identifying the existence of law. However, I shall argue that for any legal positivism the issue of the normativity of law is as important as the issue of identification of the existence of law. The real issue debated between natural law theory and legal positivism is not whether an account of the normativity of law is an important part of legal theory; rather, it is an issue of whether an account of the normativity of law can be given without appealing to a moral or political justification of law.

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[47] Waluchow, ILP, p. 78-9.

In a recent paper, Schauer maintains, "that providing an account of normativity is less central to legal theory than is often supposed, that normativity incorporates solely by virtue of Shiner's (and others') definition a moral component unnecessary to accounting for the operation of law ... "[48] And further Schauer points out that there are two unwarranted assumptions behind people's belief in the importance of law's normativity in legal philosophy.

> ... the importance of normativity being based either on (1) a debatable empirical proposition about the statistical dominance within the classes of either citizens or officials of individuals believing that there is a moral obligation to obey the law, or (2) a question-begging proposition about the soundness of the claim that, at least, officials have a moral obligation to obey and to internalize the law.[49]

What is the reason for Hart, Raz and Shiner to raise the issue of normativity of law? Schauer suggests the following reason (described by Shiner). A theory of law must start with pre-theoretical social facts, and it is a social fact that many people indeed voluntarily accept law as a reason other than sanction for action. If a theory of law ignores this basic fact, then it is a fundamental mistake. Schauer argues, however, it is far from clear that a large number of people obey the law for reasons other than those of Holmes's bad men. To assume that there are many of Hart's "puzzled citizens" or genuinely law-abiding citizens is a bald empirical assertion. Schauer's criticism is valid only if to raise the issue of law's normativity does need this "fragile empirical" assumption. I shall argue that while the issue of the normativity of law can be raised in this way, it need not be raised in this way. Let's look at Hart's view in The Concept of Law again. Hart describes,

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[48] Fred Schauer, "Critical Notice of Roger Shiner Norm and Nature: The movement of Legal Thought, CJP, vol. 24, 1994, p.498.

[49] ibid. 504-5.

> The theory of law as coercive orders .. started from the perfectly correct appreciation of the fact that where there is a law, there human conduct is made in some sense non-optional or obligatory ... In building up a new account of law ... we shall start from the same idea.[50]

For Hart, there is no question that the non-optional character of law can be simply explained by coercive force, as Schauer suggests in his example of a legal rule prohibiting publicly visible dancing even on private property. But the question again, is How are we going to tell the difference between a system of legal rules and a system of coercive orders? It may be true that a legal rule arguably can be differentiated from a coercive order uttered by a gangster purely by the factual criterion of legal validity as a legal formalist would claim. However, it won't be true that the former has the exactly same prescriptive/normative force as the latter. And moreover, it won't make sense to say that someone is obligated, or ought to turn his wallet over to the gangster when he is threatened at gunpoint.

Ronald Dworkin disagrees with Hart's positivistic theory of law in general, but not on this particular viewpoint. Dworkin starts his discussion of jurisprudence by asking; "Why do we call what 'the law' says a matter of 'legal obligation'? Is 'obligation' a term of art, meaning only what law says? Or does legal obligation have something to do with moral obligation?".[51] The point I here is this. We don't need to make any assumption about whether people are morally motivated to obey the law or whether they voluntarily accept law as legitimate (moral or non-moral) reasons for conforming with the law. What is necessary here is to ask simple questions as Hart and Dworkin do. Why do we use the word "obligation" to describe what law requires its citizens to do? Or as Raz asks, why should law be viewed as giving reasons for action? Or as Kelsen suggests, what is the difference between the order issued by a tax official and that of a gangster? The case of puzzled citizens used by Hart, as I understand, is only meant to show that if law is just naked force, we will be very puzzled by those normative language uses in legal statements.

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[50] Hart, CL p.79-80.

I think that there are two reasons for Schauer to maintain that an account of the nature of law may not necessarily involve explaining law's normativity. The first reason is that Schauer may identify the nature of law with the factual conditions for the existence of a system of legal rules. Particularly, the factual conditions are viewed as a set of formal criteria which validate the existence of law. Given this sense of the nature of law, it may be true that an account of the nature of law doesn't in any way depend on how many people in fact obey the law or for what reason they obey the law. However, as I explained in the last section, the nature of law should be understaood as lying in both the factual and normative aspects of law. It is not clear whether law can exist as law without any binding/prescriptive/normative force. I am not talking the moral force of law here. Law is supposed to be an institutionalized normative system. That is to say, law exists as a social fact must include its distinctive normative force regardless of whether empirically people accept it or not. Thus understood, it follows that an account of the nature of law should include an understanding of the normative aspect or the normativity of law.

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[51] Dworkin, 1977, p.14.

The second reason is that Schauer sometimes identifies the issue of normativity of law with the issue of moral obligation to obey law. He suggests that the issue of moral obligation is really "unnecessary to accounting for the operation of law and legal systems". As he says,

> But if, by contrast, there is no moral reason to obey the law, even prima facie, then it is hard to see how explaining the behavior of citizens who hold these unsound views ought to be a primary project for the legal philosophers.[52]

It is true that for some legal theorists, such as Philip Soper, the issue of the normativity of law is the issue of political and moral obligation to obey the law. But again, we can conceptually distinguish the former from the latter. As Schauer himself in the same paper also gives a positivist definition of normativity, which, I think, is popularly used by Hart, Raz and Kelsen. Schauer says,

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[52] ibid. p. 503.

> Normativity is what happens when legal norms guide their subjects by providing those subjects with content-independent reasons for action by virtue of inclusion of those norms within a legal system.[53]

In an earlier paper published in the CLS dominant Symposium on Normativity of Law, Schauer also defends the notion of normativity used by Hart and Raz. He writes,

> Following Hart and Raz, I want to focus on the way in which authority is, at its core, content-independent. Whether it be in the context of an argument from precedent, an argument for following a rule, or an argument for obeying the command of a superior, an argument for obedience to authority is an argument for taking some directives as a reason for action (or reason for decision) because of its source rather then because of its content.[54]

Clearly, the arguments Schauer lists here are centered on the issue of the normativity of law. I don't think that the issue of normativity understood in this way can be conceptually separated from the issue of moral obligation to obey the law, although we must assume that law necessarily generates an obligation of some sort on its subjects and law creates practical reasons for its subjects for action.

For legal positivists, it is very important to make a distinction between the issue of normativity of law and the issue of moral obligation to obey law. Raz says, "The normativity of law and the obligation to obey it are distinct notions."[55] Only when the normativity of law is understood as morally justified normativity, he suggests, "the concepts of the normativity of law and of the obligation to obey the law are analytically tied together".[56] That is to say, the real challenge for a legal positivist who is willing to take the issue of the normativity of law is this: "whether an explanation of for law's normativity can avoid undercutting a positivist account of law's ontology".[57] Postema also points out, "the problem of the normativity of law, he [Hart] suggests, is that of explaining the possibility of this characteristic use of normative language, while remaining faithful to the separation thesis".[58] Now we can summarize the problem of normativity for legal positivism as follows: Is it possible to give an adequate account of the normativity of law without giving up the positivist claim of law as a pure social fact? Is it possible to offer an intelligible explanation of why law is normative without appealing to the moral or political nature of law?

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[53] ibid. 499.

[54] Schauer, U.Penn. L.R. p.1005.

I shall answer these two questions by examining Kelsen's account of juristic normativity, Hart's account of social normativity and Raz's account of practical normativity in the following three parts.

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[55] Raz, AL, p. 137.

[56] ibid.

[57] Schauer, CJP, 1994, p. 499.

[58] Postema, (1989) p.82.

II. Kelsen's Conception of Juristic Normativity

Kelsen was praised by Hart as "the most stimulating writer on analytic jurisprudence of our day"[1] However, understanding and evaluating Kelsen's pure theory of law have been some of the most controversial subjects in modern jurisprudence.[2] As Tur and Twining point out, "many have discovered that criticizing Kelsenism is like stamping on quicksilver".[3] This is partly because of the enormous quantity of Kelsen's output over seventy years of work and the obscurity of his neo-Kantian style of writing. The main difficulty is due to the fact that Kelsen all too often explained some of his central concepts in quite different contexts and thus seems to assign them different meanings, for example, his notion of "is" and "ought", his use of "subjective" and "objective". Raz says, "Much of the obscurity of Kelsen's theory stems from the difficulty in deciding which concept of normativity he is using".[4] According to Raz, two concepts of normativity occur in Kelsen's writings, social normativity and justified normativity. The former is a positivistic notion, maintaining that "they [laws] are social norms in so far as they are socially upheld as binding standards and so far as the society involved exerts pressure on people to whom the standards apply to conform to them."[5] Law as a normative phenomenon can and should be explained in factual terms. Legal norms have their binding nature regardless of their merits. The latter stands for a naturalistic notion of normativity. Legal standards are binding only and in so far as they are justified. "An individual can consider a legal system as normative only if he endorses it as morally just and good."[6] Or to put it in a more general way, law gains its normative force from its moral foundation.

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[1] Hart, "Kelsen Visited", UCLA Law Review, Vol. 10, 1963, 728.

[2] I have often been discouraged and annoyed by the obscurities in Kelsen's works. Whenever I was in danger of losing my patient and thinking of dropping this part from my thesis, it was the following paragraph from Raz that encouraged me to continue. "Some commentators have expressed exasperation in face of what they regard as Kelsen's obscurities and have dismissed some of his central doctrines as confused. I myself have not escaped the occasional feeling of despair in struggling to fathom the meaning of some of these theses. But I have always had the sense that he was a philosopher grappling with some of the more difficult problems of legal philosophy, problems the complexity of which he often understood better than anyone. All too often I discovered that my sense of puzzlement at some of his doctrine was due to my failure to grasp the difficulties which Kelsen tackled and was striving to solve. His central doctrines have acquired for me a somewhat haunting character. Every time I returned to them I discover new depths and new insights which had escaped me before." Raz, "The Purity of the Pure Theory", Essays on Kelsen, edited by Richard Tur and William Twining, (Oxford: Clarendon Press, 1986), 79.

[3] Essays on Kelsen, ed. Tur and Twining, (Oxford: Clarendon Press, 1986), 4.

Depending upon the different understandings of what notion of normativity is being used by Kelsen, contemporary critics of Kelsen's theory are divided into three groups. Each of them views Kelsen's theory respectively as legal positivism, natural law theory, or an internally incoherent third theory of law. Alf Ross draws heavily on Kelsen's explanation of the element of coercion as an identifying characteristic of a legal system, and insists that the concept of justified normativity should be removed from Kelsen's pure theory of law. Carlos Nino believes that Kelsen's theory falls into the natural law tradition because the main thread of Kelsen's theory is his normative notion of validity - a legal rule is valid only if it is justified to be normative. On the basis of these two diametrically opposed views, a popular criticism of Kelsen's theory has emerged in the recent literature. Kelsen's project of a pure theory of law is considered to marry legal positivism and natural law theory. As a result of this unhappy and unrealistic marriage, Kelsen creates a hybrid of law both as social facts and moral norms. Deryck Beyleveld and Roger Brownsword maintain that there are two conflicting themes running through Kelsen's pure theory of law. One is identified as legal idealism (natural law theory) and the other as legal realism (legal positivism). The incompatibility of these two themes results in Kelsen's mirage of the middle way - normative positivism - an internally incoherent theory of law.[7]

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[4] Raz, Authority of Law, (Oxford: Clarendon Press, 1979), 134.

[5] Ibid.

[6] Ibid.

In several recent papers, Stanley Paulson proposes a new interpretation of Kelsen's pure theory of law.[8] According to Paulson, the uniqueness of Kelsen's approach to law may be understood as defending two distinctive theses: the normativity thesis - "claiming that law is explicated independently of fact"; and the separability thesis - claiming the separation of law from morality.[9] As Paulson summarizes, "Kelsen challenges the defenders of both traditional theories, natural law and empiric-reductive legal positivism, and in their place, he defends the normativity thesis without the morality thesis, and the separability thesis without the reductive thesis."[10]

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[7] See "Normative Positivism: The Mirage of the Middle-Way", by Deryck Beyleveld and Roger Brownsword, Oxford Journal of Legal studies, Vol.9, No.4. pp.463-512.

Paulson's understanding of Kelsen's project of legal study at least provides an angle from which the uniqueness of Kelsen's account of the normativity of law can be approached. In the first section, I shall discuss the alleged Kantian influence on Kelsen's theory. By a comparison of Kant's task in his First Critique and

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[8] Some may argue that Paulson's approach is similar to the one which accuses Kelsen's pure theory of law ofbeing internally incoherent - normative legal idealism (as Beyleveld and Brownsword suggest), because Paulson also tries to interpret Kelsen's theory as the third theory or the middle theory between legal positivism and natural law theory - normative positivism. It seems to be inevitable to view Kelsen's theory as an attempt of reconciliating both legal positivism and natural law theory, since, as Kelsen himself suggests, his whole project of legal study is to establish a theory of law "which is secured against the claim of legal positivism ... and is secured against the claim of nature law theory" (see note 20). The issue in question here is, whether Kelsen provides a unique and coherent understanding of the normativity of law. In this regard, it seems to me that Paulson and Raz provide us with a much richer interpretation of Kelsen's doctrine.

[9] Stanley Paulson, "Continental and British Normativism", Ratio Juris, Vol. 6, No. 3, 1993, 228, 231.

[10] ibid. 233.

Kelsen's mission in establishing a pure theory of law, I intend to give a philosophical background to seeing Kelsen's unique approach to the jurisprudential issues he faces. Section 2 is a recast of the normativity thesis proposed by Paulson in the light of Kelsen's overall project and his relation with legal positivism. Section 3 and 4 are analyses of two key notions in Kelsen's account of the normativity of law, his normative notion of validity and the concept of the basic norm. In section 5, I conclude my discussion by arguing that Kelsen's notion of normativity may be best understood as a special category of "juristic normativity", according to which the obligatory nature of legal norms is derived from a dynamically and internally related system of norms, and the binding nature of law can only be understood within a juristically presupposed ideology. Finally, in the concluding part, I discuss some theoretical implications of Kelsen's account of the normativity of law.

1. The Shadow of Kantianism

Kelsen admits in many places that his particular approach to jurisprudence is deeply influenced by Kant's critical philosophy.[11]

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[11] There are debates about whether Kelsen is an authentic Kantian and whether he correctly uses Kant's ideas. It seems to me that Kelsen is definitely influenced by Kant's philosophy in the following general aspects: (1) Kelsen sees himself facing the same theoretical dichotomy as Kant does in writing his Critique of Pure Reason; (2) Kelsen, following Kant, takes a transcendental approach to building his pure theory of law. Other than these two aspects, I shall leave it to Kantian scholars to figure out what exactly is the relationship

But it is a matter of debate among contemporary critics of Kelsen's theory in which respect Kelsen's doctrine is influenced by Kant 's philosophy. In the following I try to suggest that Kant's influence on Kelsen may better be understood as a methodological one. And then in the next section, I shall further discuss how this Kantian method helps Kelsen identify the task of his pure theory of law.

Following Kant's Critique of Pure Reason, Kelsen names his theory the "pure theory of law". But a theory of law, according to Kant, does not belong to the domain of pure reason, rather it is dealt with by Kant in the domain of practical reason --- morality, justice and religion. Kelsen in many places distinguishes his theory of law from a theory of morality or justice. This suggests that Kelsen's theory is not a reflection of Kant's moral and legal philosophy, which Kelsen believes to have all the trappings of classical natural law theory,[12] but rather a reflection of Kant's overall philosophical

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between Kant's critical philosophy and Kelsen's pure theory of law. For further detail, see Alida Wilson, "Is Kelsen Really a Kantian?" and Hillel Steiner, "Kant's Kelsenianism", both in Essays on Kelsen, ed. by Richard Tur and William Twining, (Oxford: Clarendon Press, 1986), p.37-64, p.65-78.

[12] "A complete emancipation from metaphysics was no doubt impossible for a personality as deeply rooted in Christianity as Kant's. This is the most evident in his practical philosophy; for it is precisely here where the emphasis of Christian doctrine lies, that the metaphysical dualism invades Kant's entire system, the same dualism he had fought so vehemently in his theoretical philosophy. At this point, Kant has abandoned his transcendental method, a contradiction in critical idealism that has been noted often enough. So it is that Kant, *whose transcendental philosophy was destined to provide, in particular, the foundation for a positivist legal and political philosophy,* remained, as a legal philosopher, in the rut of natural law theory. Indeed, his Foundation of the Metaphysics of Morals can be regarded as the most nearly

project and his methodology presented in the First Critique. Kelsen's work in legal theory may be regarded as an attempt to do what Kant himself failed to do - to construct a theory of law along the lines of Kantian critical philosophy which would enable legal philosophers to come to grips with legal data, to integrate them into a unified system, and to disclose the nature of law.[13]

Kant was long puzzled by the distinction between the sensible (sensitivia) and the intelligible (intellectualia). The distinction traditionally sets a demarcation between empiricism and rationalism. The debate between empiricism and rationalism in turn produces a theoretical dichotomy.[14] From Kant's point of view, despite the

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perfect expression of classic natural law theory as it developed out of Protest Christianity during the seventeenth and eighteenth centuries." Kelsen, General Theory of Law and State, trans. Anders Weinberger, (NY: Russell & Russell) 1961, p. 444-5. (Kelsen's italics)

[13] The legal data are legal valid norms which belong to the domain of ought (ought to be obeyed); moreover for Kelsen, there is no clear distinction between the issue of identification of law and the issue of the normativity of law.

[14] When searching for the ultimate grounds of the validity of empirical cognition, Kant in his Critique of Pure Reason specifically refers to Hume who awoke him from his "dogmatic slumber", the dilemma he himself faced in 1772. As he says,

> David Hume recognized that, in order to be able to [obtain knowledge which far transcends all limits of experiences] it was necessary that these concepts should have an a priori origin. But since he could not explain how it can be possible that understanding must think concepts, which are not in themselves connected in the understanding, as being necessary connected in the object, and since it never occurred to him that the understanding might itself, perhaps, through these concepts, be the author of the experience in which its objects are found, he was constrained to derive them from experience, namely, from a

difference between rationalism and empiricism the mistake made by both of them is essentially the same. Rationalists and empiricists both search for an explanation of the foundation of knowledge by appeal to something other than knowledge itself. For empiricism, the nature of knowledge can be reduced to observable facts in nature, while for rationalism the nature of knowledge is hiding in our intuitive understanding of super-nature. Thus they both end with skepticism --- either doubting the very existence of the objective world or being skeptical about the ability of the cognitive subjects (agent). The epistemological dichotomy thus becomes a metaphysical antinomy. Kant's "Copernican revolution", in its insistence on the epistemological priority of subject over object, postulates that any knowledge will be possible only in the form of synthetic a priori judgments.

Kelsen's attitude toward positivism and naturalism is very similar to Kant's attitude toward empiricism and rationalism. According to Kelsen, legal scholars have become entangled in 'alien' disciplines --- ethics and theology on the one hand and sociology and psychology on the other. Kelsen, like Kant, tries to purify the subject of inquiry by warding off the "foreign elements" that, he believes, have led legal theory astray in the past. Kelsen claims that the discipline known as the "specific science of law" must be

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subject necessity (that is from custom), which arises from repeated association in experience. (B127) "distinguished from the philosophy of justice on the one hand and from sociology, or the cognition of social reality, on the other."[15] The mistake for both natural law theory and classical positivism from Kelsen's point of view is the same, namely, they failed to see that the law has a special meaning of its own - the normative nature of law itself. In both cases, law is identified by something other than law -- moral values or sociological facts. In the following section, I shall substantiate this claim by discussing what Paulson calls "the jurisprudential antinomy". Kelsen's "Copernican revolution" in modern jurisprudence is to turn an external approach to law in to an internal approach to law. As Kelsen claims,

> Kant asks: 'How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by nature science?' In the same way, the Pure Theory of Law asks: 'How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms?...'[16]

The essential part of this internal approach is the purity of the pure theory. As Raz summarizes, "Kelsen's theory is, as is well known, doubly pure. It is free of sociological and psychological investigations and it separates law from morality".[17] As Kant tries to discover the a priori forms of human understanding, Kelsen tries to discover the formal categories of the legal norm as "pure a priori categories for the comprehension of the empirical legal materials".[18] Kant claims that our understanding constitutes its object. For Kelsen, an action cannot be viewed as a legal one unless we have interpreted it in a certain way. Legal norms as the subject of legal study are also thought-objects created by legal science. He says,

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[15] Kelsen, "The Pure Theory of Law and Analytic Jurisprudence", Harvard Law Review, 55 (1941-2), 44-70, p.44. Also reprint. in What is Justice? (Berkeley, Calif.: University of California Press, 1967) p.266.

[16] Kelsen, The Pure Theory of Law, (PTL) 2nd. ed. (Berkeley: UCLA Press, 1967), 202.

> We can thus state simultaneously that the rules of law are judgments formulated by legal science and that the object of such science is constituted by legal norms. ... without a doubt, one can consider that the norms created and applied within the framework of a legal order have the character of legal norms only if it is ascribed to them by legal science. It is the role of this science to attribute to certain acts the objective meaning of legal norms.[19]

Legal science, when it is not regarded as sociological description nor moral evaluation of law, will focus exclusively on the nature of legal norms. The task of legal study is to explain the normative meaning of law. Now let's take a further look at how Kelsen identifies the task of his pure theory of law.

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[17] Raz, "The Purity of the Pure Theory", p.82.

[18] Kelsen, "The Pure Theory of Law", Law Quarterly Review, 50 (1934), p. 485.

[19] Kelsen, 1953, p.45.

2. Kelsen's Normativity Thesis

From very early on in his writings, Kelsen carefully distinguishes his pure theory from either classic legal positivism or natural law theory. He says,

> The purity of the theory... is to be secured in two directions. It is to be secured against claim of a so-called "sociological" point of view, which uses the methods of the causal sciences to appropriate the law as a part of nature. And the purity of the theory is to be secured against the claim of the natural law theory, which takes legal theory out of the realm of positive legal norms and into the realm of ethico-political postulate.[20]

In contemporary legal philosophy, it is very hard to make a clear-cut and non-controversial distinction between legal positivism and natural law theory, because each of them carry too much contested jurisprudential and political baggage. When Kelsen started to articulate his pure theory of law sixty years ago, it seemed to him that there is a clear division between positivism and natural law theory. According to natural law theory, the nature of law is explicated ultimately in moral terms and morality and law are conceptually inseparable.[21] According to legal positivism, the nature of law is a factual matter, and it can be understood in a pure (natural) sociological and descriptive fashion. Now, if the conflict between positivism and natural law theory is so construed, then they are not necessarily exclusive of each other. For example, it is perfectly all right to understand the difference between them as a division of labor. That is, each of the two schools investigates different aspect of law from its distinctive point of view. These two schools of thought become two diametrically opposed positions only if we understand the central issue of the dispute between them as the following. According to legal positivism, law as a pure social fact is necessarily separated from morality while to natural law theory law cannot be conceptually separated from morality. When the conflict between natural law theory and positivism is characterized as an antinomy of the separability thesis and the inseparability antithesis, the "jurisprudential antinomy" emerges.[22] With the jurisprudential antinomy as background, "the traditional theories are not only mutually exclusive but also jointly exhaustive of the possibilities".[23] The antinomy understood in this particular way blocks the possibility of understanding Kelsen's original project, since he attempts to find a theory which differs from both positivism and natural law theory. Any such attempt will be doomed to be criticized either as belonging to one of the two camps (mutual exclusiveness) or an internally incoherent theory (joint exhaustiveness).

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[20] Kelsen, Hauptprobleme der Staatsrechtslehre, 2nd printing (Tubingen:J.C.B. Mohr, 1923), "Foreword to the Second Printing", p. v. Quoted from "Introduction", in Kelsen, Introduction to the Problems of Legal Theory, B. Paulson and S. Paulson, (Oxford: Clarendon Press, 1992), xx.

[21] Raz points out that Kelsen takes the most cruel version of natural law theory, that is, law by its content necessarily conforms to moral values and unjust law is not law at all. In fact, many contemporary natural law theorists hold that there is necessary connection between law and morality but none of them denies that there are valid unjust laws. See Raz, "The Purity of the Pure Theory", in Essays on Kelsen, 1986, p.84.

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[22] See B. & S. Paulson, (1992) p.xvii-xlii

[23] Paulson, (1992), xxv.

Like Kant's is attempt to break up the epistemological antinomy, Kelsen attempts to resolve the jurisprudential antinomy. Paulson suggests, "Kelsen's resolution of the jurisprudential antinomy stems from the observation, fundamental here, that while the traditional theories have been stated in terms of the morality and separability theses alone, there are in fact four theses to reckon with, and not just two."[24] In addition to the two theses on the relation between law and morality, the newly introduced pair of theses is on the relation between law and fact. The reductive thesis claims "that law is explicated ultimately in factual terms; it claims, in a word, the inseparability of law and fact."[25] The normativity thesis is its antithesis, claiming "the separability of law and fact."[26]

Once two additional theses are introduced, the uniqueness of Kelsen's project emerges. Classical positivism maintains the separability thesis and the reductive thesis while natural law theory holds the morality thesis and the normativity thesis. Kelsen argues for the normativity thesis and the separability thesis. By refusing the reductive thesis, Kelsen tries to differentiate himself from classic positivism, and by denying the morality thesis, he intends to distance his theory from natural law tradition. Obviously, the key to his success is whether he can defend the normativity thesis without surrendering himself to the morality thesis and whether he can refute the reductive thesis without giving up the separability thesis.

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[24] Paulson, 1992, xxv.

[25] ibid.

[26] ibid.

It would be a misunderstanding to assert that Kelsen does not have a position on the debate between legal positivism and natural law theory. He repeatedly claims that his theory is a positivist theory of law. But, how do we understand his claim?

According to Raz, three major theses have been traditionally associated with legal positivism.

> First, the reductive thesis which proposes a reductive analysis of legal statements according to which they are non-normative, descriptive statements of one kind or another. Second is the contingent connection thesis according to which there is no necessary connection between law and moral values. Third is the sources thesis which claims that identification of the existence and content of law does not requires resort to any moral argument.[27]

Traditional legal positivists, such as Austin, Ross, and Bentham, arguably hold all three theses together. Traditional natural law theorists reject all three theses together. According to Raz, the problem facing Kelsen is the most important question in legal philosophy, the problem of the double aspect of law, "its being a social institution with a normative aspect".[28] What Kelsen tries to do in his pure theory of law is to reject the reductive thesis without giving up the contingent thesis and the sources thesis. If this is the case, Kelsen immediately faces two difficulties. First, his rejection of the reductive thesis must be compatible with his defence of the sources thesis. Second, his defence of the normativity thesis must entail a rejection of the morality thesis. That is to say, Kelsen must defend all three theses together: the normativity thesis, the moral separability thesis and the source thesis. Needless to say, this is a very difficult task.

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[27] Raz (1986), Purity, 81-2.

I am not going to take a piecemeal approach to how Kelsen defends each of the theses.[29] In next two sections, I intend to show how Kelsen avoids the reductive thesis and thus distances his theory from classic positivism by analyzing his notion of normative validity, and how Kelsen rejects the morality thesis and differentiates his theory. from natural law theory by discussing his notion of the basic norm. I hope that his own defence of the normativity thesis will become clear in the course of my discussions of normative validity and the basic norm.

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[28] Raz, Purity, 82.

[29] I take it that many Kelsen's critics take this piecemeal approach. For example, in almost all of his papers on Kelsen, Raz examines Kelsen's argument with only one of the different theses in mind. The difficulty for this approach is that it is very hard to understand why Kelsen gives this or that argument for this or that thesis. I think that what ties Kelsen's theory together is his normativity thesis. If he can show that law has its distinctive feature of normativity, then this will show why law is conceptually different from morality and it will also entail the special source of law qua law.

3. A Normative Notion of Validity

Validity and normativity are two different notions. To be valid is to be pedigreed by the rule of recognition of the legal system or to trace back to a certain authoritatively recognized social source. If law is normative, then the demands that the law makes of us are such that we "ought" to conform to them. The word "ought" here is not necessarily a moral "ought". It could mean a bare minimum sense of "prescriptiveness" of a legal order or norm or refer to "effectiveness" of a legal system. It also could mean a legal or moral obligation generated by a legal rule for its subjects (a judge or a private citizen). The key difference between validity and normativity of law in contemporary literature is that the former is normally understood as a factual matter while the latter is taken to be a matter of obligation or value.

In Kelsen's pure theory of law, validity and normativity coincide. A valid norm entails that one ought to behave according to what the norm prescribes. If a norm is valid, then it ought to be followed and obeyed. For Kelsen, "that a norm ... is 'valid' means that it is binding - that an individual ought to behave in the manner determined by the norm."[30] This characteristic use of the notion of validity suggests that the normativity of law must be explained in terms of the notion of validity. But if, as we just said, validity of law is normally taken to be a factual matter, does this mean that Kelsen intends to explain law's normativity in terms of a factual matter? Kelsen's very project of legal study entails his negative answer to this question, since a positive answer to this question commits him to the reductive thesis. Clearly, if validity entails normativity and if the reductive thesis must be rejected, then this leaves him only one alternative - to interpret the notion of validity normatively. To use his terminology, we are interested in the issue of how the concept of validity exists within the realm of "ought".

To understand this, we must start with Kelsen's notion of a norm, which is supposed to be the object of legal study and the bearer of ought. The notion of a norm is one of the key concepts Kelsen frequently uses in his writings and it is also taken to be the most confused notion in his theory. The confusion does not arise at the initial stage when Kelsen defines the notion of a norm, but rather it comes from his explanation of a norm in terms of an 'ought'. Let me start with his discussion of a norm. Kelsen says,

> By 'norm' we mean that something ought to be, or ought to happen, especially that a human being ought to behave in a specific way. This is the meaning of certain human acts directed toward the behavior of others. They are so

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[30] Kelsen, The Pure Theory of Law, 2nd. ed. (Berkeley, 1967), 193. (PTL for short)

> directed if they, according to their content, command such behavior, but also if they permit it, and - particularly - if they authorize it. ...The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: the norm is an ought, but the act of will is an is.[31]

This paragraph can be understood as defining the extent and intent of the concept of norm. The extent of a norm covers a wide range of prescriptions, such as permission, command, authorization. The intent of norm is 'ought', meaning that we ought to behave according to what the norm prescribes. Kelsen says elsewhere, "The concept of norm and the concept of the 'ought' coincide".[32] But what is the notion of 'ought? Kelsen explains in his Kantian terminology, "When someone commands or prescribes, he wills that something ought to happen. The Ought - the norm - is the meaning of a willing or act of will, and - if the norm is a prescription or command - it is the meaning of an act directed to the behavior of another person, an act whose meaning is that another person (or persons) is to behave in a certain way."[33] "Ought" is the prescriptiveness expressed by an act of will and an act of will can be anything from command, or order to permission, and authorization.

Let's take an example. John's father orders him not to go out after 9:00 pm. The act of his father's ordering is an act of will and an event in the causal world. Now what is the meaning of this event or his act of will? It is to prescribe something which affects John's action. For Kelsen, commanding, ordering, permitting, legislating are all acts of will which belong to the realm of "is". We interpret those acts of will from a point of view and obtain their meanings which belong to the realm of ought. The meaning of "act of will" is further divided into two categories: subjective and objective meaning. Because the meaning of act of will belongs to the realm of ought, Kelsen also calls subjective and objective meanings as two senses of ought. Kelsen says,

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[31] Kelsen, PTL, 4-5.

[32] Kelsen, "The Concept of Legal Order" (CLO), trans. by Stanley Paulson, The American Journal of Jurisprudence, Vol. 27, 1982, p.64.

[33] Kelsen, GTN, 2.

> 'Ought' is the subjective meaning of every act of will directed at the behavior of another. But not every such act has also objectively this meaning; only if the act of will has also the objective meaning of an 'ought' is this 'ought' called a 'norm' ...The ought which is the subjective meaning of an act of will is also the objective meaning of this act, if this act has been invested with this meaning, if it has been authorized by a norm which therefore has the character of a 'higher' norm.[34]

To invest an "ought" with subjective meaning is to prescribe it, to consider personally that those to whom the norm is addressed are bound by it, that they ought to act in accordance with what the norm prescribes. When an "ought" is regarded as a subjective meaning, it is treated as what someone wishes to be or not to be, or as someone approves or disapproves. Any norm has a certain minimum force of prescriptiveness and thus contains a subjective meaning of ought.

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[34] Kelsen, PTL, 7.

On the other hand, to invest "ought" with an objective meaning is not to prescribe an action in a norm; rather, it is to say something about the special criteria that formally validate the prescription of the norm. The criteria which validate a legal norm may or may not be the criteria which one person favors. As an example of explaining the distinction between these two meanings, Kelsen says, "someone makes some dispositions, stating in writing what is to happen to his belongings when he dies. The subjective meaning of this act is testament. Objectively, however, it is not, because some legal formalities of this act were not observed."[35] This suggests that an objective meaning of ought refers to the authoritative status of norms. When an order or norm is issued in accordance with certain valid criteria, the authoritative status of a norm in question is objectively validated.

Kelsen's division of subjective and objective meanings of ought has received some criticisms. MacCormick is particularly dissatisfied with the notion of subjective meaning of 'ought'. He thinks that Kelsen has committed an imperative fallacy, a fallacy which allows normative 'ought' to be derived from the imperative 'is'. Says MacCormick, "It is perfectly clear that no command is normally involved when one person tells another what he ought to do...

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[35] Kelsen 1976, p.3

Conversely, it would be highly unusual, though not quite impossible, to give a command by using the auxiliary 'ought'".[36] As an example of Kelsen's confusion of the imperative and the normative, MacCormick quotes one paragraph from Kelsen's work, "The command of a gangster to turn over to him a certain amount of money has the same subjective meaning as the command of an income tax official, namely that the individual at whom the command is directed ought to pay something".[37] The underlying idea MacCormick tries to express here is this: the gangster's order is simply an imperative command while the order issued from the tax official is a valid norm. How could it possibly be that they share the same subjective meaning of an 'ought' and express 'x ought to do something'?

MacCormick's criticism aims at one of the central issues in Kelsen's normative notion of validity. For MacCormick, Kelsen tries to avoid the reductive thesis simply by committing himself to an imperative fallacy - deriving "ought" from "is". Is MacCormick's criticism sound? It seems to me that MacCormick's criticism raises two questions. One is specific, whether Kelsen confuses an order of a gangster with a legal command issued by a legal official or whether he has committed an imperative fallacy, namely derive "ought" from "is". The other is general: does Kelsen give a convincing explanation of the normative force of law in terms of his distinction between the subjective and objective meaning of ought? To put the question in perspective, how does Kelsen refute the reductive thesis of classic legal positivism? Let me try to answer each of them in order.

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[36] Neil MacCormick, "Legal Obligation and the Imperative Fallacy", Oxford Essays in Jurisprudence (Second Series), ed. A.W.B.Simpson, Oxford: Clarendon Press 1973, 109.

[37] Kelsen, PTL, p.8.

First of all, MacCormick is right to say that within the realm of the subjective meaning of ought, there is no way for Kelsen to tell us the difference between an order of a gangster and a command of a taxation official. Both of them express the subjective meaning of acts of will (of course we are talking of two different acts here) and have certain prescriptive force. But this obviously does not entail that Kelsen has committed himself to an imperative fallacy. To show that he does, MacCormick must add one more assumption, that is, a gangster's order or a command of a sovereign is a plain fact and thus it belongs to the realm of "is". For most contemporary legal philosophers, this assumption is taken for granted. After all, who would be willing to say an order from a bank-robber entails that someone ought to obey? However, Kelsen does not take this assumption for granted. For him, acts of will (ordering or commanding) happening in a causal world have no significance for legal study. There is no plain fact in legal science. When we start to interpret an act of will, its meaning becomes the normative object of legal science. Recall the Kantian influence we discussed earlier. To interpret an order or command is to bring its meaning out and it is also to transform its meaning into the realm of "ought". What is the meaning of a command or order, then? For Kelsen, it just expresses a certain prescriptive force to someone.

But this particular use of "ought" creates a very weak sense of ought. What is needed in legal theory is a much stronger sense of ought - a normative force indicating that someone ought to (is obligated to) follow what is required by a legal rule or order. At the level of the subjective meaning, "ought" does not have this strong sense. Kelsen is fully aware of this. This is precisely the reason for Kelsen to introduce the objective meaning of ought. It is easy to misunderstood how it is that the subjective and objective meaning are two independent notions. For example, it might be thought that a gangster's order has only the subjective meaning of ought while a legal norm has only the objective meaning. This is a mistake, I think. The key to understanding the relationship between the two different sense of "ought" is that the subjective one can exist without the objective one, but not the other way around. The objective meaning cannot independently exist without the attachment of the subjective meaning.

If this is the case and I think that it is, then the distinction between an order of a gangster and a command of a taxation official should be clear. The former only has a subjective meaning of ought while in the latter its subjective meaning of ought is interpreted as a valid norm with an objective meaning. Kelsen repeatedly says that only the objective meaning of 'ought' explains the validity of norms which one ought to follow. "To say that a legal norm is valid, that it has validity, or, what comes to the same thing, is binding is to say that the subjective meaning of the act through which the norm is posited is also interpreted as its objective meaning".[38] For Kelsen, in the absence of objective meaning, there is no difference between a legal order of a tax official and a command of a gangster, because they are both expressions of an 'act of will' and prescriptive.

One of the main reasons for Kelsen to introduce his notions of the subjective and objective meaning of ought, I believe, is to avoid the traditional dichotomy between "is" and "ought". For Kelsen, the jurisprudential antinomy created by the debate between classical legal positivism and natural law has its deep root in the Humean division of "is" and "ought", where "is" is a plain fact while "ought" is a value. As Kelsen tries not to be caught up by the traditional jurisprudential antinomy, he also tries to avoid the dichotomy between 'is' and 'ought'. In a way, the former (antinomy) is a reflection of the latter (dichotomy). To overcome the former, Kelsen must break up the latter. Inspired by Kantian transcendental method, Kelsen distinguishes the normative world from factual world (spatial-temporary one). By introducing the notion of the subjective meaning of 'ought', Kelsen thinks that he can avoid the reductivist theory of law (legal statements can only be explained in factual terms and legal phenomena can be reduced to plain facts). A mere fact won't have legal meaning unless it is interpreted normatively. By introducing the notion of objective meaning, Kelsen wants to differentiate an order issued from a sovereign from a norm validated by legal sources.

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[38] Kelsen, CLO, 65.

The plausibility of seeing Kelsen as committing the imperative fallacy, I believe, comes from the assumption of the Humean division associated with British legal positivism. When MacCormick claims that Kelsen commits himself to an imperative fallacy, he assumes that Kelsen follows Hume's division between 'is' (fact) and 'ought' (value).[39] He takes an imperative order as "is" and the subjective meaning of "ought" as expressing a normative value judgement, "the obligatoriness and binding force of law".[40] This is obviously not the case for Kelsen.

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[39] MacCormick's confusion is largely due to his failture to distinguish several uses of "ought" in Kelsen's works. Noticeably, there are two different senses of 'is', parallel to two different senses of 'ought' used in Kelsen's work. On the one hand, following Kant's lead, Kelsen sometimes uses the notion 'is' to refer to the things and facts happening in space and time. When 'ought' contrasts 'is' in this sense, 'ought' merely refers to the meaning of the events in the causal world. For example, to legislate a legal rule is an act which happens in space and time and thus is a fact. But the meaning of this act has nothing to do with the contingent fact happening in the spatial-temporary world. It is a thought object, which belongs to the realm of 'ought'. When we interpret this event, according to Kelsen (following Kant), we have already brought this event into a normative world. In this broad sense law must be a normative phenomenon rather than a factual matter. But this minimum sense of ought or normativity is not enough to explain the binding and obligatory nature of law. Kelsen then makes a further distinction between the subjective and objective meaning of ought. On the other hand, Kelsen, following legal positivism, sometimes uses 'is' to refer to the positive laws, coercive force, and efficiency of law. When Kelsen contrasts his theory with natural law theory, he says, "This order is the positive law. Only this can be an object of science; only this is the object of a pure theory of law, which is a science, not metaphysics of the law. It presents the law as it is... It seeks the real and possible, not the correct law. It is in this sense a radically realistic and

Having said that Kelsen does not commit himself to an imperative fallacy, I do not mean that Kelsen, by simply introducing his notions of subjective and objective meanings of ought, has explained the obligatoriness and binding force of law. In a way, MacCormick's deep concern is still there, if we take his concern as addressing the question of how law's normativity is derived from its validity (that is, 'ought' is derived from 'is'). In other words, if a tax official's command is distinguished from a gangster's order by the objective meaning of the former, Kelsen still have to answer how a valid norm will at the same time bring out a strong sense of "ought" to the norm. A further analysis of the notion of validity is needed here.

4. The Condition of Validity and the Reason for Validity

For Kelsen, whatever makes a norm valid also makes the norm normative and so ought to obeyed. So to identify what validates

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empirical theory." (GTLS, 13) When 'is' contrasts with 'ought' in this sense, 'ought' refers to the formal validity of law. 'Ought', as the normative sense of law, is employed by Kelsen in the contexts where the formal structure of norm-hierarchies is at issue.

[40] MacCormick (1973), 101.

norms legally amounts to the same thing as to locate the source of the normativity of law. According to Kelsen, legal validity can be identified on two different grounds. One is called the (formal) conditions of validity and the other is the (substantive) reason of validity. In the following paragraph, Kelsen explains the meanings of the condition and the reason of validity and their different relation to the normativity of law. Kelsen says,

> A positivistic theory of law is faced by the task to find the correct middle road between two extremes which are both untenable. The one extreme is the thesis that there is no connection between validity as something ought to be and effectiveness as something that is; that the validity of the law is entirely independent of its effectiveness. The other extreme is the thesis that validity and effectiveness are identical. An idealistic theory of law tends to the first solution to this problem, a realistic theory to the second ... the solution proposed by the Pure Theory of Law is this: Just as the norm (according to which something ought to be) as the meaning of an act is not identical with the act (which actually is), in the same way is the validity of a legal norm not identical with its effectiveness; the effectiveness of a legal order as a whole and the effectiveness of a single legal norm are - just as the norm-creating act - the condition for the validity; effectiveness is the condition in the sense that a legal order as a whole, and a single legal norm, can no longer be regarded as valid when they cease to be effective. Nor is the effectiveness of a legal order, any more than the fact of its creation, the reason for its validity. a condition of validity, nor the reason for its validity. The reason for the validity - that is, the answer to the question why the norm of this legal order ought to be obeyed and applied - is the presupposed basic norm, according to which one ought to comply with the actually established, by and large effective norms, actually created in conformity with the constitution.[41]

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[41] Kelsen, PLT, 211-212.

The condition of validity refers to the positive, effective and coercive features of law. They are necessary conditions for the existence of a legal system. For Kelsen, a legal (vs. non-legal) order must be positive, effective, and coercive. A norm must be actually posited for enforcement by physical sanction (if necessary), which must be generally applied. Law is not law without the positive, coercive and effective aspects. Kelsen claims,

> A general legal norm is regarded as valid only if human behavior that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words, a norm that is not effective at least to some degree, is not regarded as a valid norm. A minimum of effectiveness is a condition of validity.[42]

By identifying effectiveness, positivity and coercion as the necessary conditions for valid laws, Kelsen clearly suggests that the existence or non-existence of a legal system is a matter of a social fact. It depends on its efficacy and enforcement. It can be positively identified. The factual aspect of law is recognized by Kelsen as the conditions of validity.

Now the question is this: if we take positivity, effectiveness and coercion as the factual aspect of law, then the normative aspect of law, namely, that a valid norm ought to be obeyed, still cannot be explained. A well-organized gang may have a system of rules, which may satisfy all the necessary conditions for validating each of the orders issued by a gangster who belongs to this system.[43] Still, the order of the gangster does not qualify as having normative force. For this reason, Kelsen emphasizes that positivity, effectiveness and coercion are only conditions of validity "not the reason for validity".[44]

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[42] Raz, PTL, 11.

The reason for validity consists in a system of norms which presupposes a basic norm. In ascertaining whether a specific norm is valid, one must inquire whether it is derived from another higher norm. For example, the individual norm against stealing applied by a judge against a thief is considered legally valid - if it can be derived from a statute prescribing sanctions against the delict of theft. Seeking to ascertain why the statute designating theft as a delict is valid, one discovers that it can be derived from the legal authority of the legislative body that has created the statute. The legal validity of the statutory acts of the legislative body must again be derived from another valid norm: under the constitution, the legislative body is authorized to create such statutes. In seeking to ascertain the validity of the constitution, one finds that it cannot be derived from any higher legal source, since it is itself the highest legal source from which all other lower norms are derived. If the highest legal norm, the constitution, cannot be derived from another legal norm, then it must be derived from a non-legal norm, a basic norm as Kelsen calls it.

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[43] There is a deep jurisprudential issue here, whether it is possible for a gang organization or any coercive institution to satisfy the factual conditions for the existence of law, even if we take all the factual conditions here simply as formal ones. This is an important issue, which I am not dealing with here.

[44] Kelsen, CTLS, 42.

> It must end with a norm which, as the last and the highest, is presupposed. It must be presupposed, because it cannot be posited, that is to say: created, by an authority whose competence would have to rest on a still higher norm. The final norm's validity can't be questioned. Such a presupposed highest norm is referred to this book as the basic norm.[45]

The basic norm is presupposed to be valid but is not itself a norm of positive law. Without a presupposed norm conferring validity upon the constitution, the latter would have no legal character, and the norms below the constitution-legislative, judicial, and executive-would have no legal character either, since a norm can be derived only from another norm.

To trace the reason for validity, we see a foundationalist chain of normative imputation with a presupposed basic norm. Norm **A** is legally valid if and only if it is validated by another higher norm **B**. Norm **B** is valid if and only if it is validated by another higher norm **C.** Eventually we reach the highest norm - the constitution, which is validated by a non-legal and presupposed basic norm. In this process of validation, there is a chain of normative imputation through which each legal norm has its normative character. There is also an a priori notion of the basic norm which becomes the reason for validity and the final source of the normativity of law.

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[45] Kelsen, PTL, 195.

The division of the condition of validity and the reason for validity represents Kelsen's unique way of defending his normativity thesis without appealing to morality and fact. Paulson interprets Kelsen's solution as a "Kantian transcendental regressive argument". Paulson says,

> Kelsen follows the standard neo-Kantian tack in asking: 'How is positive law qua object of cognition, qua object of cognitive legal science, possible?' He answers the transcendental question (i) by introducing the notion of normative imputation as his fundamental category (by analogy to the Kantian category of causality), and then (ii) by adducing a transcendental argument to demonstrate this fundamental category as a presupposition of the data that are given.[46]

What Paulson suggests here is this. We cannot make sense of legal data unless we interpret them from a normative point of view, i.e. use a fundamental category of normative imputation to trace the chain of norms ultimately to the basic norm. In this way, Kelsen's normativity thesis can be uniquely understood: law as a fact must be normatively interpreted and this particular way of normative interpretation does not require any moral evaluation.

If Paulson's interpretation that Kelsen uses a regressive argument to establish a normative science of law is correct, then the very first premise of this normative interpretation becomes a crucial issue here. In a way, a regressive argument is just an analytic demonstration of what is supposed in the very first premise of the argument. That is to say, while a progressive argument takes the "data of interpretation" as the starting point of the argument, a regressive argument takes what is cognitively understood as the nature of law (legally valid rule which ought to obeyed) as given and goes further to ask how it is possible. That is to say, for Kelsen the validity of law and the normativity of law have never been separated from each other in the first place, and our task as legal theorists is only to find out how this is the case. Unlike Kant, tracing his transcendental argument back to the capital and the anthropocentric "I", Kelsen proposes that it is the notion of the basic norm that is at the final end of the chain of legal validity. It becomes the final source of legal normativity, and is what is supposed in our understanding of law. What is this mysterious notion of basic norm?

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[46] Paulson (1993), 233-34.

5. The basic norm and Juristic normativity

Let's first look at the relationship between a lower norm and a higher norm. What does it mean when Kelsen says that a lower norm is validated by a higher norm? Kelsen specifies three aspects in which a higher norm regulates a lower one.

> The higher norm is the norm that regulates the creation of another norm, the lower norm, and is thus the basis of the validity of this lower norm. The higher norm can also regulate in varying degrees of the content of the lower norm... Finally, the higher norm, governing the creation of

> the lower norm, can also regulate both the spatial and temporal spheres of validity of the lower norm.[47]

The higher norm validates the lower one with respect to its creation, content and domain. Kelsen further identifies two distinctive ways of norm-validation in general: static and dynamic. The unity of a static system is established by relations of content among the norms which belong to the system. The unity of a dynamic system is created by one and only one empowering center represented by the constitution, or more precisely, by the presupposed basic norm. As a paradigmatic example of the static systems, a Christian moral system is defined and constituted as a rational unity by two central principles "Love the Lord thy God, and, Love thy neighbor as thyself". According to Kelsen, all other norms of the moral system are logical consequences of these two fundamental principles. As a typical case of a dynamic system, a system of legal norms are constituted by a body of authorizations granting to some persons to produce valid norms of the system under consideration. In a dynamic system, the basic norm can produce a consistent system of norms proven as valid in a logical process of covalidation by means of the norm-setting acts. Since through this process of validation, legal obligation, right and duty are created, Kelsen sees this as the normative empowering function of law. He defines the notion of Ermachtigung (empowering and authorization) as follows,

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[47] Kelsen, Legal Order, 69.

"The normative function of empowering means: to give a person a power of enacting and applying norms". "Since the law regulates its own production and application, the normative function plays a particularly important role in the law."[48]

Let me recast Kelsen's view in Hartian terminology so that we may see more clearly what is going on here. In Hart's early writings, rules of recognition are identified as secondary, power-conferring social rules. Hart distinguishes between primary rules which impose duties, and secondary rules which create and regulate power. Hart suggests that primary rules create obligation in the sense that they require that we act or forbear from acting whether we wish or not, whereas secondary rules are "parasitic" or secondary, for they provide new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operation. Rules of the first type "impose duties; rules of the second type confer powers, public or private."[49] To put Kelsen's idea in Hartian spirit, the reason for the primary rules to be obligatory in nature (they ought to be obeyed) is because they are normatively derived from the secondary rules through the normative empowering category with its initial source from the presupposed basic norm. The basic norm functions as conferring the validity and normativity of each individual norm via the constitution either in its form or content, and also functions as preventing something with non-legal content (i.e. religious, political, or moral) from entering legal norms. As Weinberger suggests, "The basic norm can produce the legal system by logical inference using the content of norm-setting acts if and only if the basic norm itself is a norm of the system, but not if it is conceived of as an authorizing norm standing outside the system."[50]

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[48] Kelsen, GTN 82; also see Weinberger, 21.

[49] Hart, CL, 79.

Now let's go a further step to examine the crucial link between the constitution and the notion of the basic norm. To Kelsen, there is no doubt that the constitution is a unity of legal validity and normativity. "[T]he constitution is a valid norm, legally binding on us, and that we ought to therefore comply with it, we ought to behave as it prescribes".[51] The question is, Kelsen asks, "Why do we interpret the subjective meaning of this act [a law-creating act in the constitution] as its objective meaning, why, that is, do we interpret the constitution as a valid norm, binding on us?"[52]

We have two alternatives. We could go a step further to give a meta-justification of the constitution, for example, that the spirit of the constitution reflects the natural law (however the natural law may be interpreted). Or alternatively, we could stop at the point of the constitution and says that the constitution is a final, recognizable, sociological, historical, and institutional fact.[53] These two alternatives correspond to what Raz proposes as two notions of normativity. The former is the notion of justified normativity, while the latter is the notion of social normativity. If the constitution is "authorized by God or another superhuman authority", then the validity and the normativity of law are justified by something external, such as moral or religious reason. As we know from earlier on, Kelsen rejects this external approach to law. The other alternative is to take the constitution as self-evident or a plain social fact without further justification. The historically first constitution was either adopted by an assembly of particular individuals or issued by a powerful sovereign. Kelsen in the following passage rejects this interpretation. Kelsen says,

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[50] Ota Weinberger, "The Theory of Legal Dynamics Reconsidered", Ratio Juris, Vol. 4, No. 1, 1991, 20. I take it that this may be understood as Kelsen's version of what Raz calls the "social sources thesis" with one distinguished character, a social source with a presupposed basic norm. This leads us to see the nature of the basic norm.

[51] ibid. 67-8.

[52] Kelsen, CLO, 67.

> The fact that the basic norm of a positive legal order may but need not be presupposed means: the relevant inter-human relationship may be, but need not be,

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[53] This view is clearly expressed by Hart in his The Concept of Law . Hart says, "The sense in which the rule of recognition is the ultimate rule of a system is best understood if we pursue a very familiar chain of legal reasoning." (103) In order to find out the validity of a legal rule, we may trace it to the Oxfordshire County Council, to the Minister of Health, to the Queen in Parliament, "for we have reached a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity." (104)

> interpreted as "normative", that is, as obligations, authorizations, rights, etc. constituted by objectively valid norms. It means further: they can be interpreted without such presupposition (i.e. without the basic norm) as power relations (i.e. relation between commanding and obeying or disordering human beings) - in other words, they can be interpreted sociologically, not juristically.[54]

Notice here that Kelsen does not deny the possibility of sociological jurisprudence. The nature of law can be sociologically studied. All he rejects is the view that sociological jurisprudence can provide us an understanding of law as imposing obligation, granting powers and rights. It is the task of normative jurisprudence to study legal norms and to provide an understanding how people ought to behave according to the law, and why legal statements are normative ones.

This paragraph also suggests that the normativity of law cannot be interpreted unless a basic norm is presupposed. Since the basic norm is not posited but presupposed, it does not need further justification. The chain of validity and normativity stops at the point of this presupposed basic norm. Kelsen says, "An 'ought' statement is a valid norm only if it belongs to such a valid system of norms, if it can be derived from a basic norm presupposed as valid"[55]

This leads us to the last question of what notion of normativity Kelsen uses in his writings.

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[54] Kelsen, PTL, 218.

[55] Kelsen, The General Theory of Law and State (GTLS for abbreviation), (New York, 1945), 111.

6. Raz's Interpretation and Kelsen's Juristic Normativity

Let me start with Raz's discussion of two different notions of normativity - social normativity and justified normativity. Raz says,

> Theorists using the concept of justified normativity claim that a legal system can be regarded as normative only by people considering it as just and endorsing its norms by accepting as part of their moral views. Theorists using the concepts of social normativity maintain that everyone should regard legal systems as normative regardless of his judgement about their merits.[56]

In two important papers, Raz argues that Kelsen's account of the normativity of law can be summarized by the following three statements.[57] (1) Kelsen does not use the concept of social normativity. (2) "Kelsen uses only the concept of justified normativity. According to him, an individual can consider a legal system normative only if he endorses it as morally just and good."[58] How can Kelsen's use of justified normativity be consistent with his alleged legal positivist position? In order to answer this question, Raz proposes that (3) Kelsen also believes that "legal theory considers legal science as normative in the same sense of 'normative' but in a different sense of 'consider' which does not commit it to accepting the laws as just."[59] That is, legal theorists do believe that the normativity of law has to be justified, but they refrain from committing thmselves to the law as is morally justified normative and they merely use the notion of justified normativity in a hypothetical manner.

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[56] Raz, AL, 134.

[57] Raz, "Kelsen's Theory of the Basic Norms" in The Authority of Law, and "The Purity of the Pure Theory of Law" in Essays on Kelsen, note 1.

[58] Raz, AL, 134.

In the following, I shall comment on each of Raz's views on Kelsen's account of normativity. First, I agree with Raz about (1). Indeed Kelsen does not uses the notion of social normativity. I shall explain why Kelsen does not use this notion in the light of Kelsen's notion of the basic norm. Second, I disagree with Raz about (2). I shall argue that Kelsen does not use the notion of justified normativity as Raz suggests. Kelsen's own notion of normativity may be understood as juristic normativity. Finally, I shall argue that although Raz's detachment argument is very valuable in its own way, it may not be useful in understanding Kelsen's view here.

Kelsen claims that he is legal positivist and a legal positivist is supposed to use the notion of social normativity. But why does Kelsen think that the notion of social normativity cannot provide an understanding of law as imposing obligation, granting powers and rights and how law ought to be obeyed? The answer to this question lies in Kelsen's understanding of the object of legal science. According to Kelsen, law as the object of legal science cannot be a pure social fact. He also insists that presupposing a basic norm is a necessary condition for understanding the normativity of law. Now, if Kelsen uses the notion of social normativity, then the basic norm has to be a social fact (a set of posited basic legal rules or a rule of recognition). Since the basic norm is presupposed (non-derivative and non-positive), it cannot be a social fact. Therefore, it is not possible for Kelsen to articulate the concept of social normativity within his pure theory of law. My intuition is that by asking whether Kelsen uses the notion of social normativity, Raz has already unconsciously employed the Humean distinction between "fact" and "value". But, clearly as I suggested earlier, the very project of Kelsen's pure theory of law under the shadow of the Kantian methodology cannot and should not be viewed and evaluated in this British empiricist way.

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[59] ibid. 134-5.

Now consider Raz's second conclusion that Kelsen uses only the concept of justified normativity. Raz's conclusion seems to be derived from two different arguments. I shall briefly mention the first argument and discuss the second argument in detail. The first argument runs as the follows: There are only two concepts of normativity used by Kelsen: either social or justified normativity. Since Kelsen thinks that social normativity is not normativity, he must use the concept of justified normativity. This is a valid argument by the rule of disjunctive syllogism. But the first premise is questionable. What is the reason for Raz to think that there are only two concepts of normativity possibly used by Kelsen? One of the reasons for making this assumption is to adopt the jurisprudential antinomy. If this is the case, then we again see the hidden assumption of Humean division here.

Raz's second argument is also based on the following two observations. First, Kelsen believes that the basic norm is a precondition for the normativity of law, and second, Kelsen also claims that an anarchist or a communist will refuse to presuppose the basic norm. Thus, Raz concludes, Kelsen must suggest that presupposing the basic norm must entail adopting a certain moral point of view, and "according to Kelsen, an individual can consider a legal system normative only if he endorses it as morally just and good."[60] It is a complicated issue whether an anarchist or a communist sovereign like Mao Tse Tung will refuse to adopt the basic norm and for what reason they refuse to adopt it. When Kelsen uses the term "basic norm" in those particular contexts mentioned by Raz,[61] he is interested in the possible relationship between law as a social institution and the state as a political entity. But within the legal system, for Kelsen, to speak of individuals or groups "considering" a legal system to be morally good or bad, just or unjust, is to introduce an issue beyond the task of legal study to consider. For his pure theory of law those considerations are foreign elements. He says, "No norm created in conformity to the basic norm can be denied validity on the ground that it conflicts with morality, in particular, with a standard of justice".[62] In his Pure Theory of Law, Kelsen claims, "If justice is assumed to be the criterion for a normative order to be designated as 'law', then the capitalistic coercive order of the West is not a law from the Communist ideal of justice, nor the Communist coercive order of the Soviet Union from the point of view of the Capitalistic ideal of justice. A concept of law with such consequences is unacceptable by a positive legal science."[63] That is to say, the normativity of law is not based on whether a particular person who endorses it as morally good.

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[60] Raz, AL, 134.

[61] I am referring to Kelsen's two books, The General Theory of Law and State (New York, 1945) and What is Justice?, (Berkeley, 1960). Raz mainly quotes relevant passages from these two books for his argument here. See GTLS, 375, 413, and WJ, 226-227.

Now if Kelsen neither uses the concept of social normativity nor the concept of justified normativity, what notion of normativity does Kelsen use? We do not know the answer unless we can grasp the notion of the basic norm. The basic norm is much like an a priori concept, which Kelsen describes as existing in the "juristic consciousness".

> That the basic norm really exists in the juristic consciousness is the result of simple analysis of actual juristic statements. The basic norm is the answer to the question: how - and that means under what condition -

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[62] Raz, Legal Order, 68.

[63] Kelsen, PTL, 49.

> are all these juristic statements concerning [expressing] legal norms, legal duties, legal rights, and so on.[64]

According to Kelsen, normative terms such as obligation, rights, and duty, are widely used in legal statements in our legal community and in society at large. To understand the normative aspect of legal statements, legal scholars and practitioners must presuppose a basic norm. However, presupposing the basic norm is not a condition for the existence of a legal system. It is merely a condition of recognizing and understanding that legal system as a normative system. A legal system can exist without anyone's presupposing a basic norm. But a theory of law which explains the validity and normativity of the law cannot exist without the presupposed basic norm. In Kantian terminology, Kelsen says

> In so far as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution-creating act (and of the acts established according to the constitution) as their objective meaning, that is, as objective valid norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this normative interpretation, if it is permissible to use by analogy a concept of Kant's epistemology.[65]

Let me use a popular example in teaching Kant's philosophy to illustrate the point here.[66] We can think of our minds as a camera which takes a picture of the world through a colored lens onto a film. We are restricted to knowing the world only through the picture we take with a certain camera. If we have only black and white film, we shall never find out that there are colors in the world, nor shall we even form a notion of what color is. That is, the object of our knowledge will be the photograph, not the thing photographed. In Kant's philosophy, the object of knowledge is the experience, and not the thing itself that contributes the content of experience, nor the self that has the experience. The camera does not photograph itself and the knowledge we have is not an imposture produced internally by the camera. Our knowledge of the world is knowledge of the world, not a subjective reverie. To quote from Kant, "The understanding does not derive its laws (a priori) from, but prescribes them to, nature."[67]

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[64] Kelsen, GTLS, 116.

[65] Kelsen, PTL, 201-2.

[66] See Wallace I. Matson, A History of Philosophy, (American Book Company, 1968), 399-418.

To Kelsen, the basic norm exists in juristic consciousness and functions as a transcendental condition for our understanding the nature of law. Our understanding does not derive the validity and normativity from law, rather it prescribes the validity and normativity to the nature of law. The key point here is that there is no such thing as the nature of law or a legal system itself except in our legal knowledge or theory. The nature of law we know is the law with its normative feature. Thus understood, the normativity of law is understood as justified juristic normativity from a legal person's point of view (a jurist, lawyer, judge or a law professor). Raz describes this legal point of view as

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[67] Kant, Prolegomena, sec. 5. Kant says, "We cannot think an object save through categories; we cannot know an object so thought save through intuition corresponding to these concepts. Now all our intuition are sensible; and this knowledge, in so far its object is given, is empirical. But empirical knowledge is experienced. Consequently, there can be no a priori knowledge, except of objects of possible of experience." Kant, Critique of Pure Reason, B165.

> the point of view of the hypothetical legal man, i.e., of a person accepting from a personal viewpoint all and only the legal norms, without assuming that such a person exists... It [the pure theory of law] merely describes the point of view of the legal man and the basic norm he adopts.[68]

The notion of justified juristic normativity is different from the concept of justified moral normativity, which holds that law is normative only if someone accepts law as morally just and good. The notion of justified normativity only means (1) that from a legal person point of view, the normativity of any individual legal rule is explained in terms of its norm-connected legal system, the normativity of which is eventually warranted by the basic norm; (2) that law is normative (it is binding, it creates an obligation and it ought to be obeyed) only if a legal man accepts this presupposed basic notion.

Now, let's consider Raz's third point "legal theory considers legal science as normative in the same sense of 'normative' but in a different sense of 'consider' which does not commit it to accepting the laws as just."[69] What Raz suggests here is this. A legal scientist can view law as being normative but her viewing law as being normative does not committing her to the position that she accepts law as being morally justified normative. The first sense of "consider" means "normative interpretation of the nature of law" while the second sense of "consider" means "accepting the normative nature of law as being morally justified". The reason for Raz to make this distinction between two senses of "consideration" is this. According to Raz, although Kelsen uses the notion of justified normativity, Kelsen does not commit himself to this naturalistic position. If Kelsen indeed uses the notion of justified normativity, Raz's suggestion obviously provides a way for Kelsen to avoid an inconsistent position. That is, Kelsen claims to be a legal positivist and at the same time he commits himself to a view that law is normative only if it is accepted as just and morally good (the notion of morally justified normativity).

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[68] Raz, AL, 141.

Raz's idea of two senses of consideration later becomes a very important part of his theory of normativity. However, I don't think that Raz's conceptual apparatus is useful in explaining Kelsen's account of the normativity of law here. Raz's analysis works only if we assume that (1) Kelsen uses the notion of justified normativity and that (2) for Kelsen there is a distinction between a legal man's point of view (a legal man believes that law is normative only if it is just) and the actual position of a legal scientist (who may not commit himself to the legal man's point of view). As I suggested earlier, we don't have to assume that Kelsen must make his choice between social normativity and justified normativity. There is a third possibility - juristic normativity. That is to say, Kelsen does not use the notion of justified normativity in the first place and there is nothing he should detach from. If this is the case, there is no need for Kelsen to make a distinction between a legal man and a legal scientist. Raz thinks that Kelsen believes that a legal scientist can objectively express the legal man's point of view without committing himself to this point of view. Raz says, "legal science, says Kelsen, studies the law as a normative system but without committing itself to its normativity."[70] If we look at Kelsen's project as a whole - the normativity of law must be understood in terms of legal science - then it seems to follow that whatever a legal scientist accepts, a legal man will accept, and whatever position a legal scientist will commit himself to, a legal man will as well. In other words, there must be only one presupposed basic norm, one legal ideology or juristic consciousness under which the nature of law is normatively interpreted. As Raz himself realizes, "Kelsen the legal scientist, as well as the legal practitioner, not only describes a point of view, but actually adopts one. Legal science regards the laws as valid and hence presupposes the basic norm. The point of view of legal science is that of legal man."[71]

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[69] See note 57.

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[70] Raz, "The Purity of Law", 89.

This concludes my discussion of Kelsen's account of the normativity of law. For Kelsen, to understand the normativity of law, we must study law normatively. But his notion of normative jurisprudence is neither a moral evaluation nor the moral criticism of law. Normative jurisprudence takes legal norms as the subject matter of legal study and makes it its task as to understand the normative nature of law. For Kelsen, to understand the normative nature of law is to explain the validity of law. If a law is valid, then it is normative in that it ought to be obeyed and it creates an obligation. The validity and normativity of an individual norm must be explained in terms of its dynamic relation with other norms within a legal system, and the normativity of a legal system must be explained in terms of a presupposed basic norm. The mysterious basic norm exists in juristic consciousness and is reflects a legal ideology. For Kelsen, law is an ideology and the normativity of law eventually derives its source from this legal ideology.

Conclusion: The Implications of Kelsen's Account of the Normativity of Law - Honore's Suggestion

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[71] Raz, AL, 142.

In his "The Basic Norm of a Society", Tony Honore summarizes Kelsen's account of the normativity of law as the following. "Anyone who supposed that laws create obligations is therefore committed to supposing that a certain basic norm is valid, and that the other norms of the legal system are valid by derivation from it. The basic norm is something we discover. We do not invent it."[72]

For many years, legal scholars tried to make sense of what is behind the basic norm, namely what exactly does "legal ideology" or "juristic consciousness" refer to?[73] According to Honore, there are two possible answers to this question. One suggests that what really justifies the basic norm are certain moral and political principles. The other is Kelsen's pedigree theory with its reliance on the validity of the original constitution. Let's look at each of these two approaches.

One of the implications of Kelsen's account of the normativity of law is that we must go beyond either a static or a dynamic system of legal rules to locate the final source of law's normativity. One obvious way to discover the basic norm is to look for some political or moral principle that could be regarded as justifying a particular rule or a legal system as a whole. For example, the income tax law may be justified by the principle of fairness, or it may be justified by a democratically elected legislature. Given that the income tax law is fair or imposed by a democratic body, it follows that it should be obeyed.

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[72] Honore, "The Basic Norm of a Society", Making Law Bind - Essays Legal and Philosophical, (Oxford: Clarendon Press, 1987), p. 93.

[73] Of course, not all legal scholars think that it is significant for us even to try to discover what is behind the basic norm. For example, Soper believes that Kelsen's hypothetical notion of the basic norm has a fictional nature. For Soper, Kelsen's whole project is just like a child's game. He says, "Children play games of this sort that begin, "If your mother had wheels ..." The unabashedly hypothetical nature of Kelsen's account leaves untouched (hence the theory's 'purity') not only the question of justification but every other conceivable problem concerning the difference between law and force that might be of intellectual or practical interest." Soper, A Theory of Law, (Harvard University Press, 1984)p. 27.

However, Kelsen refuses to look for a moral or political justification for the binding character of legal norms and a legal system as a whole. The main reason for Kelsen to reject a political or moral justification for law is his particular stand of moral relativism. He believes that there are no universally held moral truths and he interprets morality as what we call "positive morality" - people's moral beliefs and their moral practice in a given society or a culture in a given historical period. Honore puts Kelsen's view in the following way.

> He wants to show that, given that it is impossible to secure agreement on moral and political principles, law can be regarded as an autonomous system of social control, independent of morals and politics. If it is to be so regarded, it must possess its own justification, based on its own ideology.[74]

The indeterminacy of positive morality and the autonomy of law are two main reasons for Kelsen to look for the distinctive ideology of law and juristic consciousness. But what is this legal ideology? Kelsen says,

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[74] ibid. p.94.

> If we conceive of the law as a complex of norms and therefore as an ideology, this ideology differs from other, especially from metaphysical, ideologies so far as the former corresponds to certain facts of reality ... If the system of legal norms is an ideology, it is an ideology that is parallel to a definite reality.[75]

Kelsen suggests here that legal ideology has its correspondent counterpart, that is, it reflects a definite reality. The notion of legal reality refers to "a chain of entitlement which constitutes the pedigree of a valid legal norm".[76] Honore calls this interpretation Kelsen's pedigree theory. According to this theory, the right of an official to demand income tax from someone can be justified if his demand is backed by proper pedigree. The demand is justified by the income tax law. The income tax law is justified by the principle that the Parliament has legislative power. The legislative power of the Parliament is justified by the Constitution. But for Kelsen this is just a notion of social normativity. As Honore says, "There must be some justification for the assertion that we ought to behave as Parliament prescribes beyond the current widespread acceptance of the view that this is the case."[77] According to Kelsen, we can find such justification from the assumption that the original constitution was validly made. That is, we must assume that the framers of the original constitution had the power validly to prescribe how members of the society should behave. Honore, along with many other scholars, thinks that "Kelsen's pedigree theory, with its reliance on the validity of the original constitution is unsuccessful".[78] First of all, there are no sufficient empirical facts to support that there is a necessary connection between the present constitution and the historically first constitution. For many countries, the connection is simply not there.[79] Even if there is a connection here, was the original constitution produced by a legitimate authority? Even if we assume that it was, "The fact that the framers of the original constitution had the right to prescribe how people should behave does not entail that their successors at the present day have the right to make law."[80]

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[75] Kelsen, WJ, 227.

[76] Honore, "The Basic Norm of a Society", p. 101.

[77] ibid. p. 102.

While positive morality and the pedigree theory are not going to work, Honore suggests that we may explain legal ideology or justify the idea of the basic norm in terms a higher social theory. Honore suggests,

> A more plausible basic norm with which to test and, in a proper case, justify the law, morality, and political institution of a society is the norm which prescribes that the members of a society have a duty to co-operate with one another. This platitudinous norm is bland enough to appeal to almost everyone, but it is not on that account

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[78] ibid. p. 103.

[79] For example, the current constitution of China is a revised copy of the Constitution of the Soviet Union. It has nothing to do with the original constitution of the Qing Dynasty back in 220 B.C.

[80] Honore, "The Basic Norm of a Society", p. 104.

> empty. If it is accepted as binding, it, or, some more ultimate norm from which it can be derived, becomes a necessary element in the justification of every law. The duty to co-operate is not itself a principle of either law, or, in the narrow sense, morality. It is in a broad sense a moral principle, which constitutes a necessary presupposition of both social morality and law so far as these are interpreted as systems of obligations.[81]

Kelsen's account of the normativity of law tells us what cannot be its final source whinin a legal system. Honore's criticism of Kelsen's account of the normativity of law tells us how we should go from there: to search for for a descriptive (moral, political or social) theory of co-ordination. In both cases, we shall look for an explanation of the normativity of law beyond the area of jurisprudence.

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[81] ibid. p.111.

III. Hart's Conception of Social Normativity

What is the role which Hart's account of the normativity of law plays in his whole theory? How does it fit into Hart's analysis of the concept of law? How does Hart approach this issue? We shall start with our discussions of these three general questions before we turn to his conception of the social normativity of law.

1. Hart's Project

The central task of Hart's legal theory is to explain the nature of law through analyzing the concept of law, as the title of his celebrated book The Concept of Law suggests. Hart unfolds his theory of law by discussing three recurrent jurisprudential questions.

> How does law differ and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?[1]

For Hart, each of the questions posed here serves a particular purpose for constructing his theory of law. The first question is posed because classic legal positivism in its Austinian form defines the concept of law as commands issued from a sovereign and treats laws as orders backed by threats. By criticizing Austin's theory of law, Hart rejects the view that law is simply a case of coercion, of people being obliged to obey commands, and proposes the key idea of his theory - law is a matter of obligation and "we need something else for an understanding of the idea of obligation."[2] What is this "something else" needed to explain law as an affair of obligation? By answering the second question, Hart denies the proposal from natural law theory, which asserts that legal obligations are necessarily moral obligations. Hart insists that the normative nature of law does not necessarily come from its moral merit, and normative terms such as 'ought', 'right' and 'obligation' have different meanings when used in legal and moral contexts. By answering these two questions, Hart suggests what the nature of law is not - neither coercive orders nor moral obligation. The third question signals Hart's own positive thesis, that is, law as an affair of obligation must be understood in terms of social rules. First, according to Hart, legal systems are understood as hierarchical systems of rules, based on fundamental rules of recognition, change and adjudication which determine the creation, destruction and application of the other rules. That is, the validity of legal rules is based on fundamental rules of recognition. The rules of recognition exist only as a matter of social fact. As Hart says, "[T]he rule of recognition exists only as a complex, but normally concordant, practice of courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact."[3] Second, Hart depicts the fundamental rules as social practices in which participants share the "internal" point of view: certain standards of behavior are regarded as obligatory, members of the social group believe that they have good reasons for demanding compliance with these standards and for criticizing non-compliance, and they characteristically use normative language (ought, right and duty, etc.) to express these demands and criticisms. A necessary criterion for existence of a legal system is that the officials in a given society adopt this internal point of view towards the law, which must be generally obeyed by private citizens. However, because laws that generate obligations are primary rules identified by fulfilling the criteria stated in a secondary rule of recognition, legal obligations are not necessarily moral obligations. That is to say, the notion of obligation has a different meaning depending on whether it is used in a legal or moral context. The two main theses Hart defends here are traditionally associated with modern legal positivism. The first one is the social fact thesis, according to which what is law or not is purely dependent upon certain social facts, such as a rule of recognition whose existence is a matter of social fact. The second one is the semantic thesis, according to which normative terms such as 'ought', 'right', 'obligation' have different meanings when used in legal and moral contexts.[4]

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[1] Hart, The Concept of Law, (Oxford: Clarendon Press, 1961) 13, hereafter, CL.

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[2] ibid. 80.

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[3] ibid. 107.

If Hart's theory of law is indeed structured in the above fashion, then we are ready to answer the questions proposed at the beginning of this section. First, Hart's project in The Concept of Law can be viewed as twofold: his criticism of traditional legal theories and his reconstruction of a new theory of law. The force of the latter relies heavily on the success of the former. Whether he can successfully defend his theory is mainly dependent upon the possibility of his explaining the obligatory nature of law in terms of the notion of obligation - imposing social rules without appealing to the coercive or moral nature of law. For Hart an account of law as a matter of obligation is not just "a fresh start" for his new theory but also becomes an essential part of his whole theory of the nature of law. Without his account of law as an affair of obligation, Hart is not able to distance himself from classic legal positivism accepted by Austin; without his explanation of the distinctive nature of legal obligation, he cannot distinguish his theory from natural law theory. The distinctive meaning of legal obligation or the obligatory nature of law here precisely refers to the normativity of law at issue.

Second, Hart's account of the normativity of law lies in his analysis of the concepts of legal validity and legal obligation in terms of their relationship to the rule of recognition. The key idea is Hart's emphasis on the internal aspect of the social rule - about the nature of the internal attitude of legal officials towards the secondary rules of a given legal system, and the sense in which such rules must be accepted as reasons for their officials' action.

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[4] See Raz, AL, Chapter 4.

Finally, Hart is not interested in offering a normative account of the normativity of law; that is, he does not wish as a legal theorist to evaluate the normative force of law from a moral perspective.[5] Following this positivist tradition, Hart believes that the normativity of law and legal obligation must be explained in a morally neutral fashion; although law normatively requires certain behaviors of its subjects, it does not follow that they have a moral obligation to obey the law. Accordingly, the problem of explaining the normativity of law, as Hart suggests in his Essays on Bentham,[6] is that of explaining the possibility of this characteristic use of normative language in terms of the social fact thesis, while remaining faithful to the moral separation thesis, a thesis emphasizing the conceptual separation of law from morality.

In this part of the dissertation, I shall examine whether Hart successfully carries out his project. I shall first present two stages of development in Hart's theory of law's normativity. In The Concept of

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[5] Of course, he would be delighted to do that as a moral theorist. See Hart, Law, Liberty and Morality, (New York: Random Hours, 1966), p.3.

[6] H.L.A. Hart, Essays on Bentham, (Oxford: Clarendon Press, 1982) hereafter EB.

Law, the issue of normativity is analyzed in terms of his notion of obligation. In his Essays on Bentham, the normativity of law is further explicated in terms of his notion of authoritative reason. Hart's complete theory of legal normativity is supposed to lie in the consistent line of thought behind these two interpretations of the normativity of law.

Given that a considerable amount of research has been done on this topic, my presentation of Hart's theory of law will be integrated with my discussion of only a few papers, selected because in one way or another, they have advanced our understanding of Hart's account of the normativity of law. The main purpose of this part of the thesis is not to present a creative and unique understanding of Hart's thought; rather it is to sort out how far Hart has advanced our understanding of the specific issue of normativity, what exactly is the problem Hart has left for us, and how we may go a step further beyond Hart to understand the normativity of law. In my discussion, I shall argue that Hart's analysis of legal obligation, though it may be viewed as a descriptive theory of obligation, only provides a very thin notion of the normativity of law, in which case he still has difficulty in differentiating himself from classic positivism. I further argue that Hart's discussion of authoritative reason, though it isolates him from classic positivism, implies a thick notion of the normativity of law, in which case he cannot actually maintain the separation thesis. By discussing Postema's criticisms of Hart's notion of authoritative reason. I suggest that even if we do not accept Postema's recommendation that a moral or political concern must be involved in understanding the normativity of law, we still have to consider some justificatory principles or theories external to jurisprudence in order to understand the issue of the normativity of law.

2. Legal Obligation and the Concept of Social Rules

In The Concept of Law, Hart discusses the issue of the normativity of law in terms of his analysis of legal obligation. Hart's analysis starts with a simple example of a coercive order, a gunman who orders a person to hand over her purse. Hart draws a distinction between the notion of being obliged to and the notion of being obligated to act What the gunman situation shows is that a person so confronted would be obliged to do as ordered. However, it doesn't show the person has an obligation to hand over her purse. Hart then replaces the gunman with Austin's sovereign and the gun with the sanction. Quite apart from the problem of locating the sovereign, Hart chiefly rejects the theory of coercive orders, because the statement that a person is obliged to do something is simply a psychological statement about the beliefs and motives of the agent. Hart says, "the statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done."[7] According to Hart, the existence of a legal obligation to obey the law is a salient feature of a legal system. A sound theory of law must give an account of this essential feature. Hart suggests that the notion of legal obligation must be understood in terms of a notion of social rule, since the nature of law is the union of primary and secondary rules and legal obligation arises from a legally valid rule.

Hart attributes three characteristics to social rules that impose obligation. First, "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great".[8] Second, social rules "are believed to be necessary to the maintenance of social life or some high price of it".[9] Third, "it is generally recognized that the conduct required by the social rules may, while benefiting others, conflict with what the person who owes the duty may wish to do."[10] Given these three salient features of social rules, Hart's general notion of obligation can be formulated as the following: P has an obligation to do S if and only if a social rule exists with the following features: (a) seriousness of social pressure behind the rule; (b) importance of the values its observance promotes; (c) possible conflict between an agent's wishes and what the rule prescribes; (d) under certain circumstance specified by the social rule P is required to perform or forbear from an action of a definite kind.

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[7] Hart, CL, 81.

[8] ibid. 84.

[9] ibid. 85.

[10] ibid.

Hart's formulation of the notion of obligation has received criticism from both the directions from which Hart is supposed to differentiate himself, from sanction-based theory and from morality-based theory. On the one hand, some theorists take feature (a) of a social rule as the foundation of Hart's analysis of obligation. P.M.S. Hacker in his "Sanction Theories of Duty"[11] claims that Hart's theory of obligation is a modified sanction theory, because duties are essentially and necessarily connected with sanctions and they are "essentially acts the performance of which is required by a social rule."[12] Says Hacker,

> The important modification to which Hart has introduced relative to the previous two sanction theories [Bentham's and Mill's] is the explicit insistence that duties are imposed by rules, that fulfillment of duty constitutes compliance with a rule and failure to fulfil one's duty is equivalent to deviation from a rule.[13]

For Hacker, the first feature of the social rule contains two critical elements: 1) the primary factor of giving rise to obligation is the importance and seriousness of social pressure behind the rule; 2) the non-performance of duty is perceived to be a reason for a sanction, and the nexus between duty and sanction is further explained in terms of social facts. In normal situations sanction follows deviation from law. But could the first feature of a social rule be understood simply as something other than sanction? Some commentators think so. Jerome Hall, for example, has offered a very different interpretation from Hacker's. Says Hall, "According to Hart, rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Here, obligations seem to mean ethical obligations."[14] For Hall, social pressure is understood as "public opinion or criticism". Moral principles and religious doctrines accepted by a given community certainly impose obligation upon members of the community, and the social pressure brought to bear upon those who deviate could be tremendous. But religious and particularly moral obligations in normal cases are not enforced by sanction.

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[11] P.M.S. Hacker, "Sanction Theory of Duty", in Oxford Essays in Jurisprudence (Second Series), ed. A.W.B. Simpson, (Oxford: Clarendon Press, 1973) pp.131-170.

[12] ibid. 161.

[13] ibid. 162.

Hacker's and Hall's different interpretations of the same "social pressure" seem to reflect a more general problem of interpreting Hart's notion of legal obligation from one particular feature of social rule. For example, similar attempts can also be found in some natural law theorists. Daniel W. Skubik takes the second feature of a social rule (promoting certain values as essential for the existence of a society) as the nature of legal obligation.[15] Further, he regards what Hart specifies as the requirement of the minimum content of natural law as an expanded version of the second feature of a social rule. Consequently, if legal obligation must be explained in terms of the minimum content of natural law, then it means that morality would be a prerequisite of law and legal obligation must entail moral obligation.

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[14] J. Hall, Foundations of Jurisprudence, (1973), p. 132

Although Skubik, Hall and Hacker hold different views about Hart's theory of obligation differently, they take a similar approach to interpreting Hart's notion of obligation. That is, each of them assumes that the notion of obligation should be understood in terms of a particular feature of a social rule. Because each of them may select a different feature of social rules, they have different understandings of Hart's notion of obligation. This approach is rejected by Barry Hoffmaster because he believes that what we need is a purely descriptive approach to understand the distinctive meaning of Hart's notion of legal obligation.

In his paper "Professor Hart on Legal Obligation" Hoffmaster provides us an example of how we should understand Hart's analysis of legal obligation in a descriptive manner.[16] According to him, to discuss Hart's notion of legal obligation, we must keep two components of legal obligation conceptually apart. "One is the sense in which a legal obligation is binding and constraining. The other is the sense in which a legal obligation provides a reason [either justifying or motivating reason] for performing an action."[17] On the basis of the conceptual separation of these two senses of legal obligation, Hoffmaster makes a further distinction between a descriptive theory and a normative theory of legal obligation. An explanation of legal obligation is descriptive if it only addresses the issue of the bindingness of law. An explanation is normative if it deals with the issue of legal obligation as reasons for action. Hoffmaster claims that Hart's explanation of legal obligation should be understood as a descriptive theory, because Hart's analysis of legal obligation only includes the sense of bindingness. He says,

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[15] Daniel W. Skubik, At the Intersection of Legality and Morality: Hartian Law as Natural Law, (New York: Peter Lang, 1990). Skubik says, "in reconstructed form, a Hartian legal theory can be seen as a variant natural law position." p. 3.

> The only explanation that is built into Hart's analysis is the sense in which a legal obligation is binding. For Hart, to say a legal obligation or a moral obligation is binding is to say that it restricts one's freedom of action. A primary rule of obligation in some sense 'withdraws' actions from the free choice of an individual. That is how Hart

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[16] Barry Hoffmaster, "Professor Hart on Legal Obligation", Geogia Law Review, Vol. 11, pp. 1303-1324.

[17] ibid. 1303.

understand the bindingness of obligation.[18]

Hoffmaster does not deny that Hart indeed discusses the issue of motivation and justification of legal obligation. He claims, "Hart does address the issues of justification and motivation in The Concept of Law, but he does so outside of his analysis of obligation and legal obligation."[19] Hart recognizes that there may be many different motivating reasons for people to obey the law: "Allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do."[20] Hart even acknowledges that one might follow the law for no particular reason at all or for immoral reasons.

Hoffmaster also believes that Hart provides a rational and moral justification for legal obligation and claims, "[I]t is the presence of this minimum content that provides a justification for voluntary obedience to valid law."[21] He quotes a passage from The Concept of law ,

> In the absence of this [minimum] content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to

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[18] ibid. 1314.

[19] ibid. 1315.

[20] Hart, CL, 198.

[21] ibid. 1316.

> submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.[22]

However, Hoffmaster insists that "Hart's *analysis* of obligation must be distinguished from his view about the justification or motivation that one has for obeying legally valid rules of obligation."[23]

What motivates Hoffmaster to examine Hart's account of legal obligation in this particular way, I believe, is his theoretical concern for defending Hart's theory of legal obligation as a purely legal positivistic doctrine. As he explicitly specifies in his paper, only his interpretation can make sense of Hart as a legal positivist and provide "strong grounds for saying Hart has a positivist account of legal obligation".[24] Hoffmaster offers us several reasons for finding the attractiveness of Hart's positivist account. First, it allows us to "admit the existence of a legal obligation to obey unjust law in a purely descriptive sense and reserve judgment about whether one has any justification or motivation for obeying unjust laws."[25] Secondly, if the notion of legal obligation doesn't entail our obligation to obey the law, then it at least provides us some foundation for not obeying morally iniquitous laws. Thirdly, it makes sense of the claim that judges at least have a legal obligation to reach legally correct decisions.

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[22] Hart, CL, 189.

[23] Hoffmaster, "professor Hart on Legal Obligation", 1318.

[24] ibid. 1320.

[25] ibid. 1319.

Two issues are present. One is about the distinction between two senses of legal obligation and the other is about what is built into Hart's analysis of legal obligation. In the following, I shall show that the distinction between two senses of legal obligation, though it is widely accepted in the jurisprudential literature, is not helpful in identifying Hart's account of legal obligation. It is the notion of the internal point of view that provides a theoretical possibility for Hart to distance himself from classic versions of legal positivism on the one hand and to differentiate himself from natural law theory on the other. However, whether Hart can turn this possibility into actuality is an issue I will leave for the next section.

First consider the issue that each sense of legal obligation corresponds to a distinctive approach to law. Hoffmaster's distinction has been explicitly or implicitly accepted by some theorists. Nicola Lacey in her recent paper "Obligation, Sanction, and Obedience" pushes this idea further. Lacey says,

> The clearest division which has been made is that between the legal obligation having to do with our duty to obey the law, which I shall refer to as political obligation, and legal obligation in the sense of what is meant by a law's being binding, which I shall refer to as the question of legal obligation. The former is generally treated as a question of moral or political philosophy, thus being 'banished to another discipline' at least by extreme positivist writers. The latter, on the other hand, can be taken as a question of analytic jurisprudence; in describing the content of a legal system, we use the

> language of duties and obligations rather freely, but apparently without meaning to make a final moral judgment about whether the laws we speak of as generating obligations ought to be obeyed.[26]

Analytic jurisprudence tries to describe the nature of law through identifying the essential qualities of law. When legal obligation refers to the bindingness of law, it is an issue dealt with by analytic jurisprudence since the bindingness of law is taken to be an internal quality of law as law. When legal obligation means "our duty to obey law", then the statements involving the normative term "obligation" are understood as judgments about law. Making evaluative judgments about law is taken to be a task of moral and political philosophy. As the argument goes, since the issue concerning the quality of law is different from the issue regarding our evaluation of law, two senses of legal obligation become distinctive subject matters respectively of analytic jurisprudence on the one hand, and moral and political philosophy on the other.

Now what does this distinction tell us about the nature of legal obligation? Very little. It says that legal obligation is binding. But obligation of any type is binding or constraining. Moral obligation, political obligation, and religious obligation are all binding. Even coercive orders have the nature of bindingness. This is just a linguistic meaning of the word "obligation". The word 'Obligation' goes back to the original Latin word *ligare* which means 'to bind' - a number of sticks into a bundle, e.g., or a bandage around a wound. What is crucial here is to specify how the existence of a legal rule provides the distinctive bindingness of legal obligation. That is to say, Hoffmaster's expression "legal obligation is binding" may be understood as Lacey's expression "law's being binding". Law generates a special kind of bindingness which is characterized as legal. But according to Hoffmaster, we must first rule out the possibility of interpreting this special kind of bindingness as providing "either motivating or justifying reasons" for an agent to perform action. Legal obligation only means that person P in a legal system L is required by certain legally valid rules to do or refrain from doing A. Hoffmaster formulates Hart's analysis of legal obligation in the following way:

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[26] Nicola Lacey, "Obligations, Sanctions, and Obedience", in The Legal Mind: Essays for Tony Honore, N. MacCormick and P. Birks, (Oxford: Clarendon Press, 1986), 220.

> P has a legal obligation to do A if and only if (1) P belongs to an existing legal system L; (2) there are relevant social rules that dictate the performance of action of kind A on the part of people on circumstances C regardless of motivating and justifying reasons of those people; (3) those social rules must be valid according to the rule of recognition. (P can be either a citizen or a legal official). Since (1), (2), (3) are descriptions of factual matters, Hart's account of legal obligation must be descriptive.

Now what is the insight of this account of legal obligation? Hoffmaster claims:

> The insight Hart wants to capture is that an action may be obligatory not because of *any intrinsic properties of the agent* or the action, but rather because *other people* think it is obligatory or expect the agent to perform or forbear. Hart views the existence of an obligation in this

sense as a factual matter.[27]

This is a key idea in Hoffmaster's presentation of Hart's analysis of legal obligation. He views the agent's (either citizens or legal officials) having legal obligation purely as a simple matter of convergence from an external point of view.

But clearly, Hoffmaster 's description of Hart's analysis ignores one of the most important ideas in Hart's account, the internal aspect of rules. Without taking account of the internal aspect of a rule, the whole normative dimension of legal obligation will be completely ignored. What Hoffmaster presents is a certain pattern of behavior falling under social rules. Having an obligation either for a legal official or for a private citizen would be merely described as their falling under certain rule-guided pattern of behavior in the absence of any reasons. This is a typical view of legal obligation from the extreme external viewpoint of those who observe the "obligation to obey the law" as a pattern of habitual behavior enforced by certain legally valid rules without any other further significance on normative impact in our life and as unreflective attitude towards the law without any justification. Hart explicitly criticizes this external point of view as sufficient to explain legal obligation.

> If, however, the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behavior, his

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[27] Hoffmaster, 1312, my emphasis.

> description of their life cannot be in terms of rules at all, and so not in terms of the rule-dependent notions of obligation and duty. Instead, it will be in terms of observable regularities of conduct, predictions, probabilities, and signs.[28]

Notice here, Hart does not deny that an externally observable regularity in rule-following behavior is necessary for explaining the notion of obligation. But for Hart the most important idea involved in the notion of a social rule is its internal aspect.

> If a social rule is to exist, some [members of the social commiunity] at least must look on the behavior in question as a general standards to be followed by the group as a whole. A social rule has an "internal" aspect in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behavior which an observer could record.[29]

What he emphasizes here is that it is the internal aspect of rule that distinguishes "a critical reflective attitude towards the pattern of behavior as a common standard" from mere external regularity of behavior of following the rule. Without an internal reflective attitude, there is no way to make a distinction between "being obliged" and "being obligated". Hart says,

> What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of

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[28] Hart, CL, 87.

[29] ibid. 55.

'ought' 'must' and 'should', 'right' and 'wrong'.[30]

Without taking account of the internal aspect of a social rule, Hoffmaster is not able to show the essential difference between Hart's theory and classic version of legal positivism such as Austin's. As Hart says very clearly here,

> Indeed, the internal aspect of rules is something to which we must again refer before we can dispose finally of the claims of the predicative theory ... Indeed, until its distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society.[31]

3. The Internal Point of View

The question we must answer now is this: How does Hart, by introducing the notion of "an internal point of view", differentiate his account of legal obligation from classic positivism on the one hand and natural law theory on the other? To answer this question, we should first examine briefly the meaning of the internal point of view. In most of the contemporary literature on Hart's theory, three notions, "internal point of view", "internal aspect of a rule" and "internal attitude" are used interchangeably. As Shiner suggests in his Norm and Nature, a proper clarification may be useful to understand the exact position Hart holds.[32] Raz in his The Concept of Legal System suggests three different but interrelated meanings of the notion of "internal point of view" used by Hart. Raz says,

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[30] ibid. 56.

[31] ibid. 86.

> (1) It designates certain facts which are part of the existence-condition of rules.
> (2) It designates certain truth-conditions of certain statements or certain implications of making them.
> (3) It designates a certain attitude to norms which can be called "acceptance of norms".[33]

According to Shiner's interpretation, the "attitude" referred to in (3) constitutes the "facts" referred to in (1) which is identified as the truth-conditions referred to in (2). Thus, Shiner concludes, Hart "must map semantically statements asserting the existence of rules on to convergent patterns of behavioral events plus the existence of the critical reflective attitude/internal point of view."[34] If Shiner's observation is right, then the burden of proof rests on the nature and force of "critical reflective attitude/internal point of view".

In a general way, the internal point of view is to be understood by reference to those who participate in legal practice, act in accordance with a given set of rules, and use them to criticize and evaluate others' conduct. That is to say, the critical reflective attitude is the attitude of the participants who at least accept the criteria of legally valid rules and act accordingly. Here the expression of "acceptance of norms " and "acting in accordance with the rules" are subject to further analysis.

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[32] R. Shiner, Norm and Nature, 1992, p.55

[33] Raz, The Concept of Legal System, 148.

[34] Shiner, NN, 56.

MacCormick distinguishes two different senses of acceptance: the strong sense of "willing acceptance" and the weak sense of "merely to accept" or "to accept without fully endorsing the rules".[35] In the first case, one is not only willing to obey the law but also take it as a public standard for evaluating and criticizing those to whom it is deemed applicable. In the second case, one accepts unenthusiastically or reluctantly the rule without taking it as a standard of conduct for such evaluation and criticism. What is common to both strong and weak senses of acceptance is that both behaviors demonstrate a certain degree of conformity to the requirements of the relevant rules. This minimum sense of acceptance is exactly the reason behind the observable facts described by Hoffmaster as "legal obligation is binding" or by Lacey as "Law's being binding". What sets apart "willing acceptance" and "mere acceptance" are two features entailed by Hart's notion of "critical reflective attitude". (1) The critical feature. In the case of the weak sense, agents may simply follow a rule without taking it as a public standard to evaluate and criticize themselves and others. In the case of strong sense, agents treat a rule as a standard of conduct for action, criticism and evaluation. Thus, "acting in accordance with a rule" is perceived by the agents as a matter of rule-conformity, not simply as a matter of fact. (2) The reflective element. While behavior in the weak sense is patterned and described in terms of a rule, it is not a result of a self-conscious attempt to apply the rule. It involves no exercise of practical reason. That is to say, agents merely behave in accordance with the rule without attending to any reasons (either motivating or justifying reason) for so behaving. Rule-following behavior in the stronger sense requires the exercise of practical reason. To follow a rule is to exercise reason in the sense that an agent conforms to the rule in the awareness that this is what he is doing and in the belief that he has reasons for doing so. Note, though, that these "reasons" still need not be 'moral' ones.

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[35] MacCormick, H.L.A. Hart, (Stanford University Press, 1981), 35.

Given these two senses of "acceptance of norms" referred to in (3) of Raz's clarification of the internal point of view, one is tempted to settle Hart's account of legal obligation exclusively either on the basis of one or the other sense. Hoffmaster's formulation of Hart's analysis of legal obligation in some way can been seen as an example of his preference for the weak sense of acceptance. But this is a mistake. For Hart, these two senses of acceptance are both required for explaining the existence of legal obligation and the very existence of social rules. Let's go back to the three senses of the internal point of view suggested by Raz. If "(3) and (1) are connected in that the facts referred to in (1) amount to the existence of the attitude referred to in (3)"[36], these two different normative attitudes toward the law both must be built into the existence-conditions of rules. Hart explicitly says,

> On the one hand those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rule of recognition specifying the criteria of legal validity and its rule of change and adjudication must be effectively accepted as common public standard of official behavior by its officials. The first condition is the only one which private citizens need satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behavior and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution. The second condition must also be satisfied by the officials of the system. They must regard these as common standards for official behavior and appraise critically their own and each other 's deviations as lapses.[37]

The internal attitude requires private citizens to generally conform to the primary rules. In a healthy legal system, citizens may treat legally valid rules as standards of conduct. But the existence of a legal system is conditioned merely upon the fact that citizens are no more than following the primary rules. This is the weak sense of acceptance of norms. However, the internal attitude also requires that the secondary rules of the system must be "effectively accepted as common public standards of behavior by its officials." Legal officials are not only obligated to apply those public standards of conduct, but they are also required to accept the criteria of validity as reasons for them to do so. This is the strong sense of acceptance of norms.

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[36] Shiner, NN, 56.

[37] Hart, CL, 113.

Now if we take what Hart has said here seriously, then "the bindingness of legal obligation" will have a much richer content than "to perform or be constrained to perform an action". It may be best understood as requiring private citizens to follow legally valid rules and obey the laws, and as requiring legal officials to accept the criteria of legal validity as reasons for imposing legal obligation on law's subjects. That is to say, when Hoffmaster and Lacey define legal obligation in its minimum sense of bindingness, its content is empty unless it is filled with "obligation to obey the law" or "reason for action". To put it differently, we cannot consistently assert that law is binding and that law does not generate an obligation to be obeyed. "Law is binding" must mean more than "law is law", or "law exists as law".

By introducing the internal aspect of rules, Hart opens a new dimension to examining the nature of legal obligation. Hart's analysis of legal obligation has two dimensions. One dimension concerns the form of legal obligation: the existence of primary rules creates an obligation on private citizens to obey the law, and the existence of secondary rules generates an obligation for legal officials to apply the laws. The other dimension concerns the normative aspect of legal obligation: the attitude of agents towards the laws constitute the nature of legal obligation. It is this normative dimension of the concept of law that enables Hart to distance himself from what he understands as a classic version of legal positivism. As Hart puts it,

> The fundamental objection is that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a *reason* or *justification* for such reaction and for applying the sanction.[38]

Clearly, the existence of social rules does not only create the bindingness of legal obligation but more importantly, as Hart specifies here, it provides reasons and justification for imposing legal obligation. The crucial question here is, what kind of reason and justification would the existence of social rules provide for imposing legal obligation on law's subjects? Now Hart must defend his semantic thesis. The reason and justification provided by the existence of social rules are not moral in nature. Normative terms, such as "obligation", "duty" and "rights", carry different meanings when they are used in legal and moral contexts. In other words, Hart must show that the statement "Jones has a legal obligation to A" does not entail that "Jones has a moral obligation to do A" although it does entail the statement that"Jones has reason to do A". The key to Hart's defense is to provide a separate account of the nature and the force of the reason or justification entailed by the existence of rules.

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[38] Hart, CL, 82. Emphasis is mine.

Let's consider Hart's two minimum conditions for law again. Hart has long thought that it is conceptually enough for law that the judges of some legal system accept the rule of recognition and the rules of law which that master rule validates. Such acceptance for Hart does not betoken any belief by judges that the rules of their legal system are morally obligatory for citizens. There would be law, according to Hart, even if judges accept the rules of their jurisdiction for numbers of different considerations: "calculations of long-term interests; disinterested interests in others; an unreflecting inherited or traditional attitude, to the mere wishes to do as others do."[39] Such different motives for judges to accept the law would only provide what Hart and Raz called the weak acceptance. an acceptance that does not claim legitimate authority for that which is accepted.

The distinction suggested by both Hoffmaster and Lacey only tells us that our moral evaluation of legal obligation is different from the nature of legal obligation. If legal positivism is understood as a theory which deals with the issue of bindingness of law while natural law theory is regarded as a theory concerned with moral evaluation of our duty to obey law, then there is no common ground for both theories to engage in a genuine debate. Although they may use the same normative terms "obligation" "duty" or "right", these terms carry very different references.

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[39] Hart, CL, 198.

But Lacey's distinction at least in a sense helps us exclude the issue of moral judgement of legal obligation from our discussion of the normativity of law. At least, we should take the issue of moral judgement of legal obligation as the secondary one. First of all, we must focus on the meaning of legal obligation.

I turn now to my discussion of the reasons offered by Hoffmaster for defending Hart's theory of legal obligation. All three reasons address a common concern - a jurisprudential concern. While natural law theory is accused of confusing legal validity and moral legitimacy, and of thus being unable to include unjust laws as laws, legal positivism must provide an explanation of the fact that an unjust law as a valid law imposes a legal obligation but lacks the normative force to have to be obeyed. By distinguishing the binding nature of legal obligation from the justification of legal obligation, Hoffmaster thinks that a positivist like Hart will be able to do just that. Judge Smith, along with other legal officials, is legally obligated to make a court's decision, "Jones has an obligation to do A". But this statement does not in any way entail that Judge Smith is morally motivated to improve or justified in imposing an obligation on Jones. Moreover, this statement does not in any way suggest that Jones will be morally motivated to obey or justified in obeying the law. That is just to say, Judge Smith takes a detached point of view of this legal statement . Detached judgments do not logically entail committed judgments. As MacCormick and Postema, both point out, "Nothing follow from this about the inference from 'Jones has a legal obligation to A' to judgments about Jones's moral or non-moral reason holding the perspectives of the judgments constant."[40] The distinction between detached statements and committed, agree both MacCormick and Postema "does not support the idea (which Hart thinks is important) that the notion of obligation has a different meaning in legal and in moral contexts."[41] What MacCormick and Postema suggest is this. If Judge Smith's statement "John has a legal obligation to pay his wife $500 per month as part of their divorce settlement" is a detached one, then it does not indicate anything about whether Jones has either moral or legal reason to follow the order.[42]

This concludes my examination of Hart's view of obligation in his early period. Now let's turn to Hart's later period, and see how Hart follows Raz's suggestion and introduces a new notion "authoritative legal reason" to account for the normativity of law.

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[40] Postema, "The Normativity of Law', p. 84. Also see MacCormick, "Comment" in R. Gavison, Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart, (Oxford: Clarendon Press, 1987), 105, 108.

[41] Postema, ibid, p. 84; MacCormick, ibid., p. 105.

[42] To make this point clearer, let's imagine an example. A person says: "according to Divine Command Theory, John should not commit adultery". This statement does not entail that John either has either a religious or a moral reason to do so.

4. Authoritative Legal Reasons

In Essays on Bentham, Hart claims that the normativity of law consists in recognizing a special kind of normative attitude of the participants in legal practice, namely, the participants' disposition to regard legally validated rules as providing peremptory, content-independent reasons for action. Hart says: "Such a standing recognition of a commander's words as generally constituting a content-independent peremptory reason for acting is a distinctive attitude, not a mere 'habit of obedience', and in my view this is the nucleus of a whole group of related normative phenomena ..."[43] There are three key elements in understanding this notion of authoritative legal reason. (1) They are authoritative reasons because they are formally validated by their consistency with the rule of recognition. (2) They are peremptory in that they are positive reasons for action and they are reasons against acting on the agent's personal deliberation or assessment of the merit of the actions. (3) They are content-independent reasons in the sense that they are "intended to function as [reasons] independently of the nature or character of the action to be done."[44]

By introducing this notion of authoritative legal reason, Hart intends to provide a new perspective to look at the issue of the normativity of law. This new perspective at least shines some light on the issue of how the factual aspect and the normative aspect of law may be reconciled. Authoritative reasons are grounded on legally recognized social sources which are purely facts. Valid norms become authoritative reasons for action because they are authorized and validated by the rule of recognition. The rule of recognition defines the validity of legal rules which in turn provide an authoritative reason for making judicial decisions within the system. The rule of recognition as the ultimate criterion for legal validity is simply based on the social fact of our judicial practice in the courts of identifying norms of the system.

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[43] Hart, EB, 256.

[44] ibid. 254.

However, the social fact of our legal practice has a normative dimension. That is, the legal practice is dependent upon participants' adoption of a particular normative attitude: "the standing willingness to regard the fact that a norm satisfies the criterion of the rule of recognition as a peremptory and content-independent reason for identifying and applying the norms."[45] Thus, the factual aspect of law is interwoven with its normative aspect and they become two sides of one coin. From one perspective, authoritative reasons gain their source from the factual aspect of law - validity and the rule of recognition; from another perspective, the rule of recognition and legal validity are partly dependent on the normative attitude of participants in legal practice.

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[45] Hart, EB, 87.

Now the main issue is the nature and the force of the participants' committed statements of law. At first glance, this question can be put in a simple form. If the committed statements of law are moral in their nature and force, then the normative terms in legal judgments share the same meanings in moral statements. If the committed statements of law have a distinctive nature and force other than a moral one, then Hart's defense of the semantic thesis is tenable. Following this line of thought, we may classify committed legal judgments into several types. First, legal officials may commit themselves to a particular interpretation of the content of a law as a correct one without regard for its moral merit. Second, legal officials may be committed to the moral value of the legal statement as the correct interpretation of a law. Third, they may also make a committed statement of law simply because they are committed to the legal system, despite dissenting from the particular legal norm. But following this line of thought, we have already assumed that Hart's account of the normativity of law is a participant theory. In the first case, the nature of authoritative reason will be content dependent; in the second, the authoritative reason will be a straightforward moral one; in the last case, it is the reiteration of the very definition of a committed statement. For Hart, the nature and the force of the committed statements of law can be discussed within an observer theory - a descriptive and explanatory approach to the normativity of law by detached statements. Detached judgments are the statements of law or legal obligation from the point of view of one who accepts the norms as imposing an obligation on law's subjects. To distinguish detached legal judgments from committed legal judgments would enable Hart to use the notion of authoritative reason to defend his semantic thesis.

For Hart, although the existence of officials making committed judgments is a necessary condition for the existence of a legal system, those committed judgments need also to be understood as no more than detached judgments of law. Officials simply assert their interpretation and application of law and their acceptance of the rule of recognition as practiced within a legal system. The officials' utterance of normative words, such as rights and obligations, neither morally licenses law nor implies that the formal validity of law's claim generates a corresponding moral obligation on the part of the subject to obey the law. Hart says: "So though the judge in this sense is committed to following the rules, his view of the moral merits of doing so is irrelevant."[46] All that follows is that the official regards himself as having reason to hold a law's subject to the standard and to evaluate and even to punish the subject's behavior by appeal to this standard.

The reasons legal officials have to utter normative language are not the reasons which motivate them to accept either the content of a particular rule or the legitimacy of a legal system as a whole. That is, whether a legal official believes that the criteria for identifying and applying legal rules are morally legitimate is irrelevant to the authoritative reason which makes her utter normative words. As long as a legal norm meets the criterion defined by the rule of recognition, it provides an authoritative reason for a legal official to guide her action and evaluate others' behavior. For Hart, to make a detached judgement never requires the agent to commit herself to the legitimacy of the ultimate criterion of legal validity - the rule of recognition. What is needed is that a legal official, in common with other legal officials, recognizes the common legal practice and has a standing disposition to regard rules which satisfy the rule of recognition as providing reasons for action. This standing disposition can be grounded in nothing stronger than judicial practice. Hart says,

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[46] Hart, EB, 160.

> When a judge of an established legal system takes up his office he finds that though much is left to his discretion there is also a firmly settled practice of adjudication, according to which any judge of the system is required to apply in the decision of cases the laws identified by specific criterion or sources. This settled practice is acknowledged as determining the central duties of the office of a judge and not to follow the practice would be regarded as a breach of duty... [47]

Judges are merely following an established legal practice and have a certain disposition to regard the law in question as a peremptory and content independent reason for doing what they are legally required to do.

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[47] Hart, EB, 158.

> Given the existence of a legal system whose courts accept specific rules of recognition, detached statements of legal obligation may be made by those who accept neither its rule of recognition nor any of its subordinate laws, either as guide to their own behavior or as standards for evaluating the conduct of others. Such detached statements are made from the point of view of the Courts who accept these things, by academic lawyers and others in describing the content of their own legal system or foreign legal systems.[48]

5. Postema's criticisms

One of the most influential papers on Hart's account of the normativity of law is Postema's "The Normativity of Law",[49] in which he systematically analyzes and criticizes Hart's notion of authoritative reason within observer theory. Postema's contribution to our understanding of Hart's notion of the normativity of law is significant in that he sets up a correct model regarding how we should deal with the issue of normativity in Hart's theory. His model contains two crucial elements which are often absent in many contemporary critics of Hart's theory on this issue. First, for some critics of Hart's theory, the issue of the normativity of law is simply the one about the normative aspect of law. The normative aspect of law is narrowly interpreted as a compliance theory of law or a moral justification of law, or a moral obligation to obey law. Postema rightly identifies the problem of accounting for the normativity of law as the one of "explaining, illuminating and where necessary reconciling two seemingly conflicting beliefs" in modern jurisprudential philosophy - the belief that law is purely a matter of social fact and the belief that law is essentially a normative phenomenon. And moreover, Hart consistently tries to carry out the project proposed by classic legal positivists such as Austin and Bentham - legal obligation does not conceptually entail moral obligation. This is important because there is a general inclination in contemporary jurisprudential philosophy to think that the issue of law's normativity is to be taken as an issue about law from a political and moral perspective, or an issue about the compliance theory of law. Thus understood, the issue of law's normativity is viewed as either an issue exclusively dealt with by natural law theory or it should be banished to another discipline, for example, political, social or moral philosophy. Postema's discussion not only regards this issue of legal normativity as "a central task of philosophical jurisprudence", but also locates the debate on the normativity of law against the legal positivist tradition.

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[48] Hart, EB, 166.

[49] Gerald J. Postema, "The Normativity of Law", Issues in Contemporary Legal Philosophy - The Influence of H.L.A. Hart, ed. by Ruth Gavison, (Clarendon Press, 1987), pp.81-104.

Second, Hart's theory of normativity is very often criticized within a participant theory, a theory which interprets Hart's internal point of view as the one expressed by those who fully participate in legal practice and are committed to the legitimacy of law's claim. Postema takes a different approach, an approach which, I believe, more accurately reflects Hart's original project. That is, Hart intends to put forward a positivistic account of the normativity of law within an observer theory. There are different "points of view" identified in the contemporary literature. (1) There is an extreme external point of view from which law as a pure fact of social institution is observed by those who do not commit themselves to the legal system in question. (2) There is an internal point of view from which law is viewed as an activity of social practice from those who participate in the legal system, and accept it as legally binding and obligatory. (3) There is a moderate external point of view of those who merely report the belief of committed participants or who take law as standards to evaluate themselves and others' behaviors without accepting an internal point of view.[50]

From an internal point of view, law is essentially normative. "As participants, we may be concerned with how we ought to behave, what our rights and duties are, when we may fall back on the framework of law to defend our rights or justify our actions, or the extent to which the law legitimately claims our allegiance."[51] Thus, it is natural to talk about the normative nature of law within a participant theory. Strictly speaking, from an extreme external point of view, the issues of legal obligation and the normativity of law cannot be genuinely raised, since law is fundamentally factual and legal obligation is viewed as a straightforward legal liability to a sanction. However, from a moderate external point of view, those social facts which determine what law is could include facts about the normative beliefs of those who inhabit the internal point of view. If the internal aspect of legal rules, as Hart suggests, is indeed one of the conditions that must be met if a legal system is to be enforced in a community, then observers must be not only concerned with the problem of arranging their activities to avoid obstacles the law puts in their way (the aim of the 'bad man'), but also with the problem of the obligatory nature of law and the normativity of law in general.

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[50] MacCormick, for example, expresses this view in his H.L.A. Hart.

[51] Postema, 84.

Granting that an extreme external point of view is not interesting, we now have two possible approaches to the problem of the normativity of law. Postema remarks:

> An observer theory would, inter alia, attempt to set out the truth conditions of detached judgments or the conditions that must be met if a legal system is to be enforced in a community. A participant theory would attempt to set out in a systematic way the truth conditions of committed legal statements.[52]

While it is a mistaken idea to try and settle the difference between natural law theory and legal positivism by treating them exclusively as either an observer or a participant theory, that does not mean that it is makes no difference whether we examine Hart's account of normativity from one or the other perspective. As Hart himself clearly indicates in both The Concept of Law and Essays on Bentham, his chief interest is not to construct the truth conditions of committed judgments or develop a substantive political or moral theory for a conception of law which permits identification and application of law and legal obligations entirely apart from questions of moral merits of law, as a typical positivist participant theory would do. Hart's concern, as I suggested earlier, is to offer a positivist account of the normativity of law in terms of his social fact thesis and his semantic thesis. That is, it is his intention to sort out the distinctive use of normative language in legal statements from the point of view of observers. Of course, Hart's theory of law as a whole may entail a substantive political theory about the nature of law (a participant theory of law). But this will be a rather different topic than the one Hart intends to address. It will be unintelligible to ask the question of whether Hart rightly set up a truth condition for committed judgments or a question of how law's normativity is morally justified given his task of legal theory.[53]

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[52] ibid. 85.

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[53] Jeffrey Goldsworthy, in his "The Self-Destruction of Legal Positivism", Oxford Journal of Legal Studies, Vol. 10, 1990, pp.449-482, claims that the vulnerability of Hart's semantic thesis ultimately entails the self-destruction of positivism as a participant theory. It seems to me that it is internally incoherent to approach Hart's account of law's normativity within a participant theory and at the same time to criticize Hart's semantic thesis. The former requires to develop a substantive political or moral theory of the conception of law, while the latter tries to differentiate 'obligation' in its legal context from either its moral or political one.

Postema gives two criticisms of Hart's account of the normativity of law. First he argues against the notion of detached statement, and second he argues against the possibility of the officials' commitment to a legal system without considering the moral legitimacy of the criteria by which a norm is validated and then serves as a reason for action.

Let's first look at Postema's first argument. According to Postema, Hart's account of the normativity of law through his newly introduced notions, detached statement and authoritative reason, may theoretically provide some way to serve the alleged connection between law and morality. The judge makes a committed statement while recognizing that he could utter the corresponding detached legal judgement. When the judge says "P has a legal obligation not to do A according to rule L", he could merely express an opinion from the court. If the latter is indeed a detached judgement, then nothing would follow regarding the judge's reason to expect the law's subject to obey or the subject's reason to obey. Consequently, nothing would follow regarding either the judge's moral justification for issuing the order or the law's subject's moral obligation to comply with the court order. However, Postema argues that this view is counter-intuitive and it necessarily results in some serious theoretical consequences.

First, Postema argues that when Hart proposes the detached statement as a solution to the problem of the normativity of law, the essential issue here is still the nature and the force of a legal officials' committed statement. "[F]or detached judgments are possible only if there is a point of view from which the committed judgments are made. The theoretical issue focuses on what exactly is expressed, or entailed, by these committed judgments. That detached judgments can also be made is not relevant at this point."[54] If a judge makes a committed judgement and what he actually expresses is the detached judgement, we still face the same question. What is the normative force of what the judgement expresses here? If a committed judgement indeed serves as an authoritative reason for the judge to impose an obligation on a law's subject, it must at least have some minimum normative force. It cannot simply mean that the judge merely utters the normative term "legal obligation", or "legal obligation" means nothing more for the law's subject, than that he is liable to suffer for non-compliance.[55] That is to say, if the judgement made by the judge only implies his uncommitted, and the law's subject's detached - attitude toward law, then the normative aspect of law remains unexplained. This also seems to conflict with Hart's internal point of view which requires a certain degree of legal officials' commitment to the legal system.

Second, Hart's proposal of the detached judgement may be motivated by his jurisprudential concern. That is, Hart wants to allow the possibility of judges recognizing that legal systems are so bad that some of the law-subjects have simply no reason whatsoever to comply voluntarily with its command.[56] The notion of detached judgement certainly serves this purpose for Hart. But it has a high cost. The cost is that, if we do allow that the judge has a legal obligation to apply the legally valid rule to the law's subject while the subject does not have either a legal or a moral obligation to obey it, then "the reasons generated by the fact that one is subject to a formally valid rule of law are simply extinguished ."[57] The theoretical difficulty here, according to Postema, is whether we can intelligibly make both claims: (1) P has a legal obligation to comply with A and (2) P has no reason to comply with A. Says Postema,

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[54] ibid. 89, n.18.

[55] ibid. 90.

> The phenomenon of the wicked system forces us to break the links between a) the existence of a formally validated rule of law, b) the existence of an obligation to comply with it, and c) the existence of the reason to do so. Hart's account makes the break between the existence of the obligation and the existence of reasons. This seems counter-intuitive. The more natural place to introduce the break is between the existence of formally valid rule of law and the existence of an obligation to comply.[58]

Why is it counter-intuitive? Why is it more natural to introduce the break between the existence of valid rules and the existence of legal obligation? I think that for Hart it is much more natural and intuitive to cut the connection between the existence of legal obligation and the existence of reasons to obey, and it is more counter-intuitive to assume the break between the existence of the formally valid rules and the existence of legal obligation. Let's recall Hart's view in The Concept of Law, that legal obligation is entailed and generated by formally valid rules. Legal obligation in its descriptive sense, according Hoffmaster, only means the bindingness of law, "constraint from doing something". Legal obligation has nothing to do with either motivational reason nor justifying reason. If we do agree with this interpretation of minimal sense of legal obligation, then Hart at least gives us an intuitive account here. But why does Postema think Hart's interpretation is counter-intuitive here? No direct argument is offered by him. I think that there is a much deeper issue involved here. For Postema, legal obligation without normative force is an empty notion, and it is not a legal obligation in legal practice. If the statement "P has a legal obligation" only means that "P must comply without any justified reason", then what exactly is the difference between Austin's command theory of obligation and Hart's rule theory of obligation?! In order to show the difference, Hart must add a certain normative force to this notion of legal obligation. The formally valid rules would not be weighty enough to differentiate Hart from Austin, because the command of law can be formally validated as well. This leads to Postema's last criticism of Hart's notion of detached statement, the one which shows the substantive difference between Postema and Hart regarding what counts as the formal feature of a legal system.

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[56] Hart, CL, 195-8.

[57] Postema, 91.

[58] Postema, NL, 91.

Third, Postema agrees that there could be some situations in which officials are bound to follow rules which make no rational claim about the law's subject. This is simply an empirical matter. The crucial issue here is whether this can be a pervasive feature of a legal system. If it is, Postema claims, then a legal system will be a coercive system of order. This claim is based on three interconnected premises: (1) Law is a distinctive way of directing human behavior; (2) it is necessary for law-making and law-applying officials to look at the rules and directives from the law-subjects point of view, to understand the role the rule can be expected to play in the practical reasoning of law-subjects; (3) the property that distinguishes law from other exercises of social power is that the law claims authority to issue directives as well as back them up with threats of force.[59] Postema says,

> And if they cannot claim legitimacy for themselves, we have no basis on which to accord them even de facto legitimacy. But then there is a straightforward sense in which the institutionalized coercive force cannot be regarded as law.[60]

Law does not simply claim authority, and its claim must be legitimately justified, and the legitimacy of this claimed authority must be taken as a formal feature to be built into the concept of legal system.

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[59] ibid. 91-2.

[60] ibid. 93.

Postema's second major criticism focuses on the issue of the nature of commitment to the rule of recognition. Particularly he criticizes Hart's denial of any moral involvement in the officials' acceptance of the rule of recognition as providing an authoritative reason for judicial action.

According to Postema, Hart's notion of authoritative reason in Essays on Bentham does not advance Hart's argument against the naturalistic view, which maintains that acceptance of the fundamental law of a system must rest on a conviction of the moral legitimacy of that law. Postema offers two reasons. First, "exclusionary reasons of the sort Hart thinks operates in the legal context are not self-validating. The issue here is what sorts of reasons are characteristically given by self-identified participants in the practice for regarding satisfaction of the criteria of validity as peremptory and content-independent reason."[61] Second, even if judges do take the rule of recognition as their reason for action, it does not follow that there need be no moral reason available for accepting and applying it. Postema believes that Hart's objection to naturalism rests on his social fact thesis. "The authority of these criteria rests entirely on the social fact that the practice manifests their general use and acceptance."[62] This social fact can be looked at in two different ways. The first way is called the simple convergence thesis. Participants have in common only in their accpetance of the criterion of validity - a social fact of a broad of convergence on the criteria accepted. The second is the strict conventionalist thesis, according to which the authority of the criteria is entirely dependent upon the social fact of whether or not the criteria are widely accepted. Postema thinks that neither of these theses are defensible although it is unclear which one Hart would prefer. They fail because the nature of commitment to the rule of recognition cannot be a matter of social fact, either a simple convergence of using the same rule or a convention accepted in legal practice. Legal officials as rational participants must have their views on the practical significance of a fundamental rule of the system. "Indeed these views may well be partially constitutive of the kind of enterprise or normative system involved."[63] On the basis of his criticism of these two theses, Postema finally proposes his constructive conventionalism.

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[61] ibid. 94-5.

> On this view, officials recognize, and are committed by their actions and arguments to recognize, that their joint acceptance of the criteria of validity must be linked to a more general moral-political concern. Only in this way can their appeal to those criteria, and the practice on which they rest, provide the right sort of justification for

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[62] ibid. 95.

[63] ibid. 96.

their existence of power in particular cases.[64]

I take it that Postema's theory of constructive conventionalism is just a very rough sketch of what an adequate theory about the normativity of law would look like, because he does not give us much in the way of positive arguments for this position, nor the detail about the content of this theory.[65] For my purpose, what is important here are the implications of Postema's criticisms, rather than whether he can come up with some brand new theory.

6. The Implication of Hart's Concept of Social Normativity

Postema's criticisms of Hart's account of the normativity of law can be summarized as the following two points. (a) Hart 's detachment argument only suggests that a committed statement doesn't entail a detached statement, but it does not show that "obligation" has different meanings when it is used in legal and moral contexts. That is, Hart's semantic thesis is indefensible. (b) Hart's notion of authoritative reason does not advance his argument against naturalism, and the nature of commitment to the rule of recognition cannot be explained simply by virtues of the officials' recognition of criteria of validity in legal practice. That is, Hart's social thesis is indefensible. Behind his two criticisms, there is a positive theme Postema tries to press. Hart's detachment argument is too weak to catch the normative force expressed in legal statements. To explain the normativity of law we must investigate the nature and force of committed judgement in legal statements because the detached judgments are possible only if the committed judgments to law are made. Though Hart is right about the irrelevance of an officials' personal motivation of acceptance, he ignores that a committed judgement entails a justifying reason. In order for a legal system to be effective in legal practice, the reason justifying judges' actions must also be the reason for law's subjects to obey. The mere social facts of officials' convergence in believing the same fundamental rule of recognition and of officials' convention in acknowledging authoritative reasons for applying the laws are not sufficient to justify the legitimacy of their acceptance of the criteria for validity and their imposing legal obligation on law's subjects. A moral and political concern must be involved in providing genuine reasons for the legitimacy of accepting and applying the law.

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[64] ibid. 104.

[65] For detail of Postema's constructive conventionalism, see Shiner, NN, p.250-7. Shiner devotes one section to a discussion and a criticism of Postema's theory.

If Postema's understanding of Hart's conception of social normativity is alright, then these are the theoretical implications of Hart's account of the normativity of law. We may ask Postema why providing a justificatory reason for the legitimacy of accepting and applying law must involve MORAL or POLITICAL concerns. It seems to me that all Postema successfully argues is that Hart's social fact thesis and his semantic thesis are not adequate and there must be some extra-legal concern must be involved in explaining the normativity of law. To assert that the extra concern must be either moral or political, Postema has to supply some additional arguments, which may turn out to be exactlt the same arguments he needs for his new theory of constructive conventionalism. But for now, it is safe for us to conclude that the lesson we learn from Hart's effort to explain the normativity of law from the point of view of social rules and authoritative legal reason is this: we need some substantive principles or theories external to legal or social facts to account for the normativity of law.

IV. Raz's Conception of Practical Normativity

Among contemporary legal positivists, no one has done more than Joseph Raz to develop a systematic and sophisticated theory of the normativity of law. From his early analytic writings on the nature of practical rationality to his later critical discussion on the theory of practical authority, Raz has deepened our understanding of the issue while defending a distinctive and seemingly controversial conception of practical normativity. He claims that the existence and content of law are exclusively determined by purely social facts independent of any moral considerations but that "no system is a system of law unless it includes a claim of legitimacy, of moral authority."[1] He claims that the very point and purpose of law as a social institution is to provide authoritative guidance to all citizens within its scope, yet he denies that there is a general obligation for citizens of a given legal system to obey the law. The richness of Raz's theory provides us an opportunity to see a sophisticated theory of the normativity of law within legal positivism. Yet the controversy surrounding his account also offers us a chance to see the limits of what a legal positivist can do with respect to the problem of the normativity of law. The main task of this part of the thesis is to present Raz's ingenious solution to the problem of the normativity of law through his accounts of exclusionary reasons and authority, and at the same time I try to show that an account of law's normativity inevitably requires us to go beyond the limit and domain of analytic jurisprudence practiced by legal positivism.

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[1] Raz, "Hart on Moral Rights and Moral Duty", Oxford Legal Studies, Vol. 4, 1984, 131.

Section I discusses Raz's criticisms of the sanction-based and the morality-based accounts of the normativity of law. Raz's criticisms are based on an assumption that an account of the normativity of law must be able to explain the nature of law as practical reason for action, especially the exclusionary nature of authoritative directives. Sections II and III are examinations of Raz's doctrine of exclusionary reasons. Through my discussion of Perry's and Schauer's criticisms of Raz's doctrine, I argue that Raz's notion of exclusionary reasons is not an adequate model of rule-based decision-making in law and in morality. I then suggest that the notion of exclusionary reasons denotes a property a reason may or can have only as part of a system of norms which claims authority. More specifically, it refers to the institutional force of law identified as providing law's subjects with content-independent reasons for action by virtue of excluding all other considerations except those identifiable by legal sources. Sections IV and V are a critical discussion of Raz's account of practical authority. Through a discussion of Waluchow's, Dworkin's criticisms and the debate between Shiner and Baker, I argue that there is a dilemma in Raz's account of law as exclusionary reasons. The notion of law's claiming authority is too thin to explain the nature of law as exclusionary reasons for action while the notion of law's authority as exclusionary reasons is too thick to be qualified as legal positivism. Finally, Raz's account of detached normative statements is examined and I conclude that Raz's account of the normativity of law will lead us to look for a high social theory of law which is beyond the enquiry of analytic jurisprudence practiced by legal positivism.

1. The problem of the normativity of law

Raz devotes the last chapter of his Practical Reason and Norms to the problem of normativity of law.[2] For Raz, the normativity of law is a practical issue. Law operates in the domain of the practical and belongs to the domain of practical reason. Since "legal philosophy is nothing but practical philosophy applied to one social institution"[3] and legal institutions are primarily characterized by their norm-guided activity, legal theorists must deal with the problem of the normativity of law. Legal norms in any given system do not just tell us what it would be in our interest to do, what it would be nice to do, or what is desirable or meritorious to do. Legal norms indicate what we must do, what we are bound to do, what we are obligated to do.

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[2] Raz, Practical Reason and Norms, (New Jersey: Princeton Press, 1990)

[3] Raz, PRN, p.149.

This social fact is also reflected in the normative language we use in legal discourse. Given these facts, Raz claims that legal theorists must "explain what precisely is meant by saying that legal rules are norms (i.e. reasons for action), and what justifies the use of normative terms to describe the law."[4]

Like Kelsen and Hart, Raz's first step in constructing his own account of the normativity of law is to examine the inadequacy of two traditional accounts of law's normativity. Is the normativity of law just an institutionalized coercive power? Or is it to be understood as a particular kind of political and moral normativity? Is legal obligation nothing more than liability to legal penalty, as Austin thought? Or is it understood as a species of moral obligation, as Aquinas believed? According to the sanction-based theory, one ought to do what a legal rule requires because it is believed that a sanction is likely to be applied or force used against the offender in case of the violation of law. According to the morality-based theory, one has an obligation to obey the law because the content of a legal rule or a legal system as a whole may represent some profound moral values or moral considerations thought to be important to the existence of a society. In the following I shall examine Raz's criticisms of the sanction-based and the morality-based accounts of the normativity of law. It seems to me that while Raz's criticisms of these two theories are not convincing, the assumption underlying his criticisms indeed provides a fresh start to investigate the issue of the normativity of law.

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[4] Ibid, 153

Raz rejects the sanction-based theory. A sanction-based theory is based on a "motivational generalization", which states, "it is normally, or usually or frequently, the case that violations of law are the occasion for the imposition of sanction or the use of force against their perpetrators."[5] This generalization is true only if (1) law provides for sanction or the use of force against all violations of law, and (2) law is by and large efficient and its sanctions are generally applied when deserved. If the motivational generalization with its two premises is true, we may be able to consider that "for normal people in normal circumstances this would be a reason for obeying the law."[6] Raz argues that the motivational generalization with its two premises is neither empirically nor theoretically true.

(1) If sanction-based theory can explain the normativity of law, then either empirical sanctions will be an essential feature "present in all situations to which that legal rules apply",[7] or theoretically a legal system cannot exist without sanction.

(2) It is at least possible that people have committed crimes

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[5] ibid. 156

[6] ibid.

[7] ibid.

without being sanctioned in many cases (for example, the crime is not detected or the criminal leaves the country) or for different reasons (some mandatory rules are addressed to legal officials and they are not backed by the sanction).

(3) To use sanction to explain the normativity of law requires that sanction or the use of force is a logical feature of our concept of law. It is possible that a legal system can exist with its normative force but without using force or sanction.

Raz concludes: "The inevitable conclusion is that, despite the undoubted importance of sanctions and the use of force to enforce them in all human systems, the sanction-directed attempt to explain the normativity of law leads to a dead end."[8]

Raz suggests that a sanction-based motivational reason may be viewed only as an auxiliary reason, which may play an important role in conforming with what is required by laws. However, there is no guarantee that this particular kind of motivational reason will always be present. Even if it is present, there is no guarantee that this motivational reason will prevail in the balance of reasons. Moreover, the fact that people are motivated by their fear of sanctions does not tell us why people are normatively required to follow the law, why laws are standards of conduct for the norm's subject, and why legal statements are normative.

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[8] ibid. 161-2

Raz also rejects the morality-based theory. According to Raz, we may think that some laws embody moral value, such as justice, or we may argue that the very existence of a legal system is based on political morality. However, if the normativity of law is explained in terms of the moral validity of legal rules, then we have to show that legal rules regulate all areas of human conduct in a morally good way, and explain why many legal positivists are happy to use normative language in describing the law but they clearly refuse the natural law explanation of morality as a necessary condition for the validity of law. Raz argues,

> if natural law theories are to explain the use of normative language in such contexts they must show not only that all laws are morally valid but also that this is generally known and accounts for the application of normative value to the law."[9] Since natural law theorists are not able to prove both assumptions, it follows that, "natural law cannot explain the normativity of law.[10]

At first glance, the sanction-based theory and the morality-based theory seem to be quite different approaches to the normativity of law. The former relies on the psychological factor of the agent who obeys the law out of his fear of legal punishment, while the latter is based on the moral content of law which imposes an obligation on the norm's subjects. However, Raz thinks that they both fail to give an adequate account of law's normativity for the same reason: they both attempt to explain the normativity of law by showing that laws are just ordinary first-order valid reasons which compete with other first-order reasons for action. There is no guarantee that either of those first-order reasons will be present in rule-based decision-making in law. For Raz, "since we are ready to refer to a legal rule as a norm we must explain that by pointing to features present in all the situations to which that rule applies."[11] What Raz suggests here is this: in order to understand the nature of law's normativity, we must analyze a certain logical or formal feature of legal rules as norms. To Raz the statement "legal rules are norms" should be understood as the statement "legal rules are reasons for action". Thus, to discuss the formal or logical feature of legal rules as norms is to figure out what kind of practical reasons is provided by legal rules for action. The special kind of reasons suggested by Raz is exclusionary reasons - a special kind of the second-order reason - to discount other first-order reasons in assessing an action's rightness. Thus, the first and foremost task for explaining the normativity of law is to analyze the formal or logical feature of the reason-giving character of legal rules as norms.

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[9] ibid. 170

[10] ibid.

2. Legal Rules as Exclusionary Reasons

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[11] ibid. 156

Law falls within the scope of the practical. It purports to generate obligations on the part of norm-subjects who are bound to obey the law. For Raz, to understand how laws generate obligation is to explain how laws provide practical reasons for action. Consider the case of John Wong, who was recently divorced and lost custody of his child to his wife. According to the court's settlement, John only has once-a-week visitation rights to his daughter. He has many reasons to disobey the court order. He loves his daughter very much, his ex-wife is an occasional alcoholic, and he can provide a better life for his daughter than can his wife. He also has many reasons to obey the order. If he does not obey the order, he will be punished by law or he may upset his ex-wife. He may also think that the particular legal rule applied to this case represents some moral value which he happens to think is important for the society (e.g. protecting children's rights). Or he may have the view that obeying law generally is a good thing to do. These are all first-order reasons for John either to obey or disobey the court's order. The first-order reason, according to Raz, is the reason which dictates directly that someone takes a certain course of action and one "ought, all things considered, to do whatever one ought to do on the balance of reasons."[12] As we can see from this example, they may conflict with each other in a given situation. Loving his daughter may give John a motivational reason to disobey the court order while his fear of legal punishment is his prudential reason to obey the order. These two reasons are not necessarily in conflict. But given this particular situation, they do conflict. This is what Raz calls "strict conflict": where reason R1 dictates that P does A, and where reason R2 dictates that P does not do A. To solve the conflict between these two reasons John may assign one more weight than the other. The weightier one will become his reason to obey or disobey the law. Does John have certain criteria for assigning the weight of each of the relevant reasons in this case? Yes. But each individual may have a different criterion for the balancing reasons in a given situation and what criterion one may have is to a large extent dependent upon the individual's belief. That is to say, an agent's moral intuition, personal motivation, and individual judgement will directly figure into his balance of reasons when he decides what course of action he is going to take. If a court order is regarded merely as one of the those reasons, it does not have any special status or normative force for John to conform to it. On the balance of reasons, John may or may not obey the court order in this particular case.

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[12] ibid. 36

What is problematic here is that the special status of a legal order is underdescribed. A legal order issued by a judge is supposed to discredit certain other first-order reasons by suspending them. The fact that John ought to obey the order cannot be based on some contingent facts (his prudential reasons or moral considerations); it must be explained by focusing on the nature of practical reasoning - the reason-giving character of obligation-claims themselves.

This special character of practical reasoning is understood as an exclusionary reason. Exclusionary reasons belong to the class of second-order reasons, which do not bear directly upon proposed course of action; they are "any reason to act for a reason or to refrain from acting for a reason."[13] They furnish reasons to act for a first-order reason or to refrain from acting for a first-order reason. Reasons to act for the first-order reasons are positive second-order reasons, while reasons to refrain from acting for the first-order reasons are negative second-order reasons. The latter are the most significant for Raz's explanation of the formal feature of legal rules as reasons for action, so he gives them a special name, exclusionary reasons. As Raz says, "The type of reason I was particularly concerned with is exclusionary reasons: reasons not to act for certain reasons."[14] One of the key features of an exclusionary reason is that it mandates for those who accept it that certain otherwise applicable reasons will be excluded from the decision-making process. As Raz says, "the very point of an exclusionary reason is to exclude acting for another consideration which is a valid reason for action."[15]

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[13] ibid. 39

[14] ibid. 183

[15] ibid.

Consider the case of John again. When the court order is to be treated as an exclusionary reason, it bears a special relation with all the other first-order reasons. It requires that John suspend all the other first-order reasons against what the law requests in making a decision regarding whether the order ought to be obeyed. By virtue of being the court's order, John is not allowed to compare the weight of his first-order reason(s) against visiting his child whenever he wants with the weight of the court order as an exclusionary reason for his action. Raz says, "the very point of an exclusionary reason is to bypass issues of weight by excluding considerations of the excluded reasons regardless of weight."[16] Where there is a conflict between an exclusionary reason and the first-order reasons, the former always prevails by excluding the latter from consideration and not by overriding or canceling them.

So far I have briefly discussed the logical feature of exclusionary reasons. A reason is an exclusionary reason if and only if it excludes reasons one may have from being one's motivation for action.[17] Raz does not deny that one may have many different reasons for performing an action. But if an authoritative directive is taken to be an exclusionary reason, then it by nature has this special logical feature, namely, excluding all the other otherwise valid reasons from the process of decision-making. If we apply this notion of exclusionary reason to the area of legal decision-making, then legal rules function as exclusionary reasons in such a way that one is not allowed to make a decision on the balance of all the available first-order reasons and the relevant rule requires one to rule out otherwise relevant considerations for either obeying or disobeying what is required by the legal rule.

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[16] ibid. 190

[17] Raz, PRN, p. 185.

We must be careful here to formulate Raz's view on exclusionary reasons. First, an exclusionary reason by no means is an absolute reason for action. By an absolute reason I mean a Kantian categorical imperative of sorts. An exclusionary reason might be cancelled by another exclusionary reason or overridden by a first order-reason unexcluded by it. An absolute reason of Kantian sort (i.e. a categorical imperative) is usually understood as incapable of override in any circumstance. Second, an exclusionary reason takes a negative form of a second-order reason. A Kantian categorical imperative acts more like a positive second-order reason, generating a perfect duty on a moral agent who should be morally motivated by this very reason to take the action or to refrain herself from taking what this reason prescribes. Strictly speaking, an exclusionary reason by definition does not necessarily require the subject to do what a legal rule requires. Exclusionary reasons are **negative** second-order reasons, "reasons **not** to act for certain reasons".[18] To explain this negative feature of exclusionary reasons, we may think about what a positive second-order may be. A positive second-order reason creates an obligation to act on certain reasons. For example, if I promised my wife to stay home to give her some moral support when she was ill, then I have a reason to stay home not simply for the reason I happen to have something to do at home for any other reason, rather I stay home precisely for the reason that I promised that I would give my wife certain moral support when she doesn't feel well. Now if my promise to stay at home functions only as an exclusionary reason, then I may conform to the exclusionary reason by not staying home at all (to avoid my personal motivation to stay at home) or by staying at home (not for the reason of giving her moral support).[19] That is to say, the primary function of an exclusionary reason is only to require its norm's subject to **exclude** his or her personal inclinations, motivations and beliefs as reasons for action. More precisely, it is a reason **not to act** for certain reasons.

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[18] Raz, PRN, p. 183.

It is in this sense that rules and promises cannot only function as exclusionary reasons. As Raz says in his Practical Reason and Norms and his Authority of Law,

> Rules and commitments are what I call protected reasons, i.e. a systematic combination of a reason to perform the act one has undertaken to perform, or one required by the rule **and** an exclusionary reason not to act for certain

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[19] See Raz, PRN, pp. 35-48, pp. 178-85

> reasons (for or against).[20]
>
> ... the same fact is both a reason for an action and an (exclusionary) reason for disregarding reasons against. I shall call such facts protected reasons for an action.[21]

To take the example of John again, if the court's order is taken only as an exclusionary reason, then it will exclude John's personally motivated reasons from not-following the order. But from this it does not follow that John ought to follow the court order. John may not follow the court order for some other second-order reason or some first-order reason which is uncancelled by the original exclusionary reason. If the court order is to be understood as a protected reason, then John not only has an exclusionary reason to exclude his reason for or against the order but he may also have a reason to conform with what the order requires. I take it that the reason for Raz calling rules and promises protected reasons is that the nature of rules as exclusionary reasons protects an agent from being influenced by all the other first-order reasons for or against the action except one particular first-order reason: acts in accordance with what a relevant rule requires. In this way the normative force implicated in a rule can be conceptually separated from other considerations an agent may have in performing an action, such as prudential reasons, moral motivation or other personal beliefs an agent may happen to have.

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[20] Raz, PRN, p. 192, my emphasis.

[21] Raz, AL, p. 18.

So far we have described the formal role an exclusionary reason plays in a piece of practical reasoning (which I call the thin sense of exclusionary reason). Raz reminds us that

> exclusionary reasons are more than occasional features of this or that person's situation. They are systematically related to central structures of practical reasoning, in that rules and commitments are by their nature exclusionary reasons.[22]

This is a sweeping claim. In his Practical Reason and Norms, Raz seems to provide a more general theory of practical reason than a particular model of legal decision-making, given that he keeps producing non-institutionalized norms and examples and the fact that he uses authoritative directives, promises, commitments, and rules interchangeably. As Michael Moore says,

> Raz's early work is rich in examples of exclusionary reasons defeating their first-order foes, not by outweighing them, but by depriving them of any weight. Raz has considered in detail how commands, promises, vows, oaths, authoritative rules (including laws), moral rules, social rules, decisions, and judgments about one's future incapacity to decide may each operate as exclusionary reasons.[23]

It is understandable why Raz needs to make such a claim given his criticisms of the sanction-based and morality-based theories. As I suggested in the last section, to Raz an adequate account of the normativity of law must explain a necessary feature present in all the situations where rules apply. But the question is, are rules by nature exclusionary reasons?

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[22] Raz, PRN, 191.

[23] Moore, "Razian Reason", Southern California Law Review, vol. 62, 1989, p. 850.

3. Criticisms of Raz's Notion of Exclusionary Reasons

In his "Judicial Obligation, Precedent and Common Law", Stephen Perry argues that Raz's doctrine of exclusionary reasons is too narrow to give an account of the nature of legal rules.[24] According to Perry, "an exclusionary reason is simply the special case where one or more first-order reasons are treated as having zero weight."[25] Between first-order reasons and exclusionary reasons, there "lies an indefinitely large number of further possibilities, all of which are variations on the idea of a weighted balance of reasons."[26] For example, Perry thinks that in common law courts, judges do not look upon a precedent as precluding all other considerations of the reasons for it. Perry instead argues for "the strong Burkean conception of precedent", according to which "a court is bound by a previous decision unless it is convinced there is a strong reason for holding otherwise."[27] That is to say, authoritative directives in many ways are not necessarily exclusionary but they have some effect on the weight of other reasons for action. Perry's criticism is obviously correct because an exclusionary reason in its strict sense does not create a positive weight to either act or not to act for whatever reason. Thus the force of an exclusionary reason can only be ranged from assigning certain first-order reasons to zero weight to reducing their weight. Perry's criticism implies that the very issue of weight cannot be bypassed, though an exclusionary reason may have its preemptive force on balance of reasons. Perry's criticism of Raz's notion of exclusionary reason is much more enforced by Schauer's discussion of the presumptive nature of legal rules.

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[24] Stephen Perry, "Judicial Obligation, Precedent and Common Law", Oxford Journal of Legal Studies, vol. 7, 1987, 215-57.

[25] Stephen Perry, "judicial Obligation, Precedent and the Common Law", 7 Oxford Journal of Legal Studies, (1987), 223

[26] ibid

MacCormick in his recent "Hart's Lecture Series" remarks that Schauer and Raz are two philosophers who have advanced our understanding of the nature of legal rules after Hart's The Concept of Law. However, it seems to me that each of them takes a very different approach to the nature of legal rules. Schauer in his Playing by Rules suggests that Raz's doctrine of exclusionary reasons gives an inadequate account of rule-based decision-making. Schauer says: "The primary inconsistency appears to be in the way in which Raz takes exclusionary reasons as incapable of override, claiming that an exclusionary reason 'always prevails' in cases of conflict with a first order reason."[28] This, Schauer argues, reflects poorly the nature of rule-guided decision-making. By analyzing Raz's own example of Jill and her decision to always go to France for holidays, Schauer questions the plausibility of Raz's notion of exclusionary reasons in explaining rules in our life and in law. According to Schauer, Jill's rule (decision) can be overridden if one of the original reasons for Jill to make this decision is dramatically changed. For example, imagine that Jill was offered $10 per night for a room at the Hilton hotel in the Austrian Alps. To use Schauer's expression, for some psychological reason, the background justification for our ordinary decision-making cannot always be "opaque". In the case of Jill's decision, if Jill gives "a perfunctory glimpse at a first-order reason", i.e. this particular good deal, her rule about holidays (always go to France for holidays) may likely be overridden. This shows, according to Schauer, rules are presumptive in that some particular weightier first-order reason may defeat an exclusionary reason. Notice that Schauer does not deny that one of the important functions of rules in legal decision-making is to exclude certain considerations otherwise relevant. As he suggests, rules are "opaque to their underlying justifications and impede access to those facts that would otherwise, under a given theory of justification, be relevant to make the decision, and they interpose facts that would otherwise irrelevant."[29] But Schauer claims that authoritative directives such as legal rules are presumptive reasons for action. It is presumptive in the sense that the pedigreed rules or authoritative directives serve primarily as substantively skewed accommodations to epistemic uncertainty and they can be overridden by stronger reasons from the full normative universe.[30]

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[27] ibid. 222

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[28] ibid. 89

To see the theoretical difference between Raz's view of rules as preemptive reasons and Schauer's view of rules as presumptive reasons, let's look why Schauer thinks that Raz's notion of exclusionary reasons is inadequate to capture the nature of legal reasoning. Schauer points out, "Raz's account of rules as exclusionary reasons remains incomplete in several important respects".[31] First, Schauer suggests that rules can function both as exclusionary and inclusionary reasons as well. Rules not only tell the agent what should be excluded but they also remind the agent of what can be included in making a legal decision. Second, Raz does not address the issue of generality and particularity of exclusionary reasons. As a result, "we are unable to focus on an important question about the status of an exclusionary reason".[32] Without knowing the logical status of rules in general, it is impossible to understand why a rule provides a reason for action even when the justification lying behind the rule is inapplicable.

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[29] Schauer, Playing by Rules, p. 87.

[30] ibid. 294.

[31] ibid. p.91.

Schauer's first criticism reminds us of two different claims made by Raz. The first claim is a familiar one; rules by nature are exclusionary reasons. The second claim is Raz's occasional remark that rules are protected reasons, as I mentioned in the last section. The second claim is compatible with Schauer's suggestion that rules function as exclusionary and inclusionary reasons as well. The question is, are Raz's two claims consistent? Theoretically speaking, there is no inconsistency here. Raz may say that legal rules by nature are exclusionary reasons. That means that rules are not simply identical with exclusionary reasons and they only function as exclusionary reasons. More precisely, to Raz rules are protected reasons, which are a combination of positive second-order reasons (or first-order reasons) and exclusionary reasons.[33] In this sense, then the difference between Schauer and Raz seems to be "ultimately an empirical and psychological one".[34] Each view is a distinctive way of characterizing how legal rules function in legal decision-making.[35] We may think that in a formal structure such as the military, Raz's exclusionary reason will make much more sense than Schauer's. Schauer's presumptive reason may fit better in describing those "easy" cases, difficult common law cases and especially those so-called "hard" cases, in which a legal norm is in conflict either with another legal norm (with less degree of local priority) or with even a norm from a particularly strong norm from the full normative universe.[36] On this intuitive level, Raz's preemptive theory may have a much narrower domain of application than Schauer's presumptive theory in rule-based decision-making in law.

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[32] ibid. 93.

[33] Indeed Raz in some places does not make this distinction very clear and leaves an impression that legal rules are only exclusionary reasons.

[34] Schauer, Playing by Rules, p. 91.

If Schauer's first criticism shows the practical difference between the presumptive model and preemptive model, then his second criticism, by addressing the issue of the status of legal rules, indicates the substantial difference between Raz's approach and

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[35] Roger A. Shiner, "Rules of Power and Power of Rules", Ratio Juris, Vol. 6 No. 3, 1993, 279-304.

[36] See Schauer, Playing by Rules, p. 204. The case of Riggs vs. Palmer may be viewed as the first type of hard cases. 115 NY 506, 22 NE 188 (1889). A grandson, named as beneficiary by his grandfather, attempted to collect his legacy by murdering his grandfather. When the case was presented in the court, the grandson relied on the Statue of Wills (one name in a will shall inherit in accordance with its term) while the challengers relied more successfully on a more remote rule, one prohibiting people from profiting by their own wrong. For Dworkin's discussions on the case, see R. Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1985) p.39.; Law's Empire (Cambridge Mass.: Harvard University Press, 1986) p.15-20. In Chapter 5 of his Inclusive Legal Positivism, "Charter Challenges", Waluchow provides us a range of cases, which show that how legal valid rules may function as presumptive reasons for action when they are in conflict with norms from a full normative universe. ILP, pp. 142-165.

Schauer's approach in general. Since Raz does not makes a distinction between particular and general exclusionary reasons, he is not able to analyze the entrenched nature of rules. For Schauer, the entrenched status of rules is an important issue because it explains why in many cases rules provide reasons for action even when the justification lying behind those rules are inapplicable. Why does Raz not even bother to make this important distinction while Schauer takes the issue of entrenchment so seriously? I think that the difference between Schauer and Raz is deeply rooted in the basic notions each of them uses to construct his theory. For Schauer the basic notion is "rule" while for Raz it is "norm". The fact that Raz uses the word "norm" may suggest that what Raz is really interested in is the prescriptive or normative force of law. According to Schauer, the term "norm" is incapable of being analyzed in terms of the distinction of generality and particularity. He says, "[T]he prescriptive use of 'norm' collapses the particular and general, and in part despite that feature of the word. It is the term of choice in much of contemporary normative theory."[37] Thus understood, while Schauer is keen on working out his presumptive model of rule-based decision-making in law, Raz is really interested in the prescriptive or normative force of law in general.

The implication of Schauer's second criticism suggests a new perspective from which Raz's doctrine of exclusionary reasons should be understood. In the following, I shall argue that the term "exclusionary" has to denote a property a reason can have only as a part of a system of reason, a system of legal norms that claims authority. More specifically, I shall argue that (1) Raz's doctrine of exclusionary reasons does not capture the nature of rules in a non-institutionalized system of norms; (2) Raz's doctrine of exclusionary reasons is an essential part of his legal positivism and is derived from his theory of law as claiming practical authority. (1) is to reenforce the implication of Schauer's criticism, that is, Raz's doctrine of exclusionary reasons is neither a theory about the nature of legal rules nor a theory about the nature of rules functioning in practical reason in general. If this is the case, then it implies that Raz cannot explain the normativity of law simply in terms of a formal or a thin sense of exclusionary reason. (2) suggests that the thick sense of exclusionary reasons utilized to explain the normativity of law is derived from Raz's theory of the nature of law as practical authority. If this is the case, then it follows that the normativity of law must be further explained by virtue of the substantive nature of law to claim authority.

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[37] Schauer, PL, p.14, n.25.

Raz's notion of exclusionary reasons is not plausible in explaining non-institutionalized norms such as morality. Let's look at the logical features of moral rules in moral decision-making in the contexts of Kantian deontology and Mill's utilitarianism. In the former moral rules are taken to be absolute and universal while in the latter moral rules are essentially considered to be prima facie and social-interests-oriented. Raz himself explicitly denies the conceptual connection between his notion of exclusionary reasons and Kantian Categorical Imperatives (unconditional commands). From Raz's point of view, "Kant, however, went a step further".[38] That is, moral duty generated by Kant's categorical imperatives must be performed in accordance with morally right motives and good wills. It is this notion of value-loaded motive in Kantian theory that Raz explicitly denies. As Raz explains, for Kant reasons for action must be reasons for compliance while exclusionary reasons for action are only reasons for conformity. The difference between compliance and conformity is this: the former requires the agent to recognize the moral value for following a rule while the latter does not.

Rules in Raz's doctrine of exclusionary reasons cannot be prima facie rules specified in Mill's utilitarianism either. A prima facie rule is an "all things considered rule", which should be followed only if there is no equal or more important moral consideration which requires an agent to act otherwise. That is to say, the notion of a prima facie rule entails the idea of balance of reasons, while the notion of exclusionary reasons by its very definition excludes the idea of balance of reasons.

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[38] Raz, PRN, p. 181.

Now Raz's doctrine of exclusionary reasons are neither an adequate model for moral reasoning nor for legal decision-making. What is the significance of Raz's doctrine? I think that Raz's doctrine of exclusionary reasons is very important for his exclusive version of legal positivism. As Waluchow in his Inclusive Legal Positivism suggests, Raz tries to identify the institutional force of law with a particular kind of force - exclusionary force.[39] Raz's doctrine of exclusionary reason is a key part of his exclusive legal positivism, which is mainly characterized by his social sources thesis. The social sources thesis "prescribes that all law is source based, where a law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative or moral argument."[40] To hold the social sources thesis, Raz must show that "it is possible to identify the directive as being used by the alleged authority without relying on reasons or considerations on which the directive purports to adjudicate."[41] That is to say, legal rules as authoritative directives must function as reasons for action without relying on their (moral) content. The doctrine of exclusionary reason seems to supply an explanation how authoritative directives are understood as practical (exclusionary) reason for law's subjects to take action without appealing to either psychological, prudential or moral reasons.

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[39] Waluchow, Inclusive Legal Positivism, (Oxford) 1994, p.137.

[40] Raz, PRN, 296, and AL, 47ff.

[41] Raz, "Authority, Law and Morality", Monist, vol. 68, 1985, p. 301.

Moreover, by introducing the notion of exclusionary reasons Raz has advanced Hart's account of the normativity of law. Hart was the first one who defined the nature of law as the union of primary and secondary rules. A legal system structured as a set of legal rules exhibits the institutional aspect of law. However, Hart's treatment of rules in terms of standard patterns of behavior backed by the internal attitude of legal officials not only lacks sufficient detail but also brings up many difficulties. First, Hart maintains that one has an obligation if and only if the behavior in question is required by a social rule which is enforced by serious pressure to conform, thought important to social life, and which may conflict with immediate self-interest.[42] Given his explanation, it is very likely that the legal directives, even when accompanied by the internal point of view, are conceived as first-order reasons. If they are only first-order reasons such as fear of social pressure or fulfillment of certain values essential to the existence of society, then Hart will have difficulties in differentiating his theory either from the sanction-based theory or from the morality-based theory. By taking rules as exclusionary reasons, Raz opens up a possibility of explaining the "non-optional" quality of law without being associated with either the sanction or the morality-based explanation.

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[42] Hart, CL 84-5.

Second, one crucial part of Hart's account of the normativity of law is that law's applying officials must take internal attitudes toward the law. But once it is only the attitude of legal officials which counts, then the problem of the normativity of law still remains. Hart has to show why legal rules are also norms for citizens (namely, for citizens laws are also reasons for action). Austin's bad men and Hart's citizens may give the same answer to the question "Why should you obey the law?" The relationship between a given legal system and its citizens may still be coercive. By viewing the nature of legal directives as exclusionary reasons, Raz supposes that the very point and the purpose of law as a social institution is to provide authoritative guidance, to everyone within its scope, and citizens as well as legal officials must regard legally valid rules as creating reasons of a special kind within its scope.[43]

Now if Raz's doctrine of exclusionary reasons is to give a positivistic explanation of law's normativity, which differs from the sanction-based and the morality-based accounts, Raz has to show that the exclusionary feature of legal norms is indeed present in all the situations where legal rules apply. How does Raz make a case that the feature of law's normativity is indeed exclusionary? In his Authority of Law, Raz claims that the existence of a norm can be individually identified by tracing back to its social source while the binding force of a norm doesn't depend on its particular moral merit. Rather, the normative force of a particular norm is based on the normative force of a legal system to which the norm belongs. As Raz says,

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[43] Raz, PRN, 146-8, AL, 92.

> A rule of law is valid if and only if it has the normative consequences it purposes to have. It is legally valid if and only if it belongs to a legal system in force in a certain country or is enforceable in it, i.e. if it is systematically valid. Similarly an obligation is a legal obligation and a right is a legal right if and only if they are an obligation or a right in virtue of a rule which is legal valid. Validity presupposes membership and enforceability. Judgments of membership and of enforceability are judgments of social fact. Judgments of legal validity are normative judgments partly based on those facts.[44]

Raz's doctrine of exclusionary reasons is meant to provide an understanding of law's normativity in general rather than in every individual case. In other words, Raz is aiming to identify the institutionalized normative force with a particular kind of force - exclusionary force. As Raz says,

> Exclusionary reasons are involved in the analysis of institutionalized norms yet in another way. We saw that authoritative determinations of primary organs are binding even if wrong. This means that an authoritative determination of a primary organ to the effect that x has a duty to perform a certain action is an exclusionary reason for x to perform that action. That a primary organ has so decreed is a reason on which x should act regardless of what conflicting reasons for x to perform

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[44] Raz. AL. 153.

that action.[45]

The ultimate explanation or justification for the nature of rules as exclusionary reasons can only be understood in the context of an institutionalized system such as law which is capable of claiming authority. The thick sense of exclusionary reasons understood as an institutionalized force is identified as providing law's subjects with content-independent reasons for action by virtue of excluding all other considerations except those identifiable by legal sources. Exclusionary reasons generated from an institutionalized system such as law have their binding force to their subjects and create duty or obligation on their subjects. In the following two paragraphs, Raz claims that the exclusionary force is not only a necessary feature of law's claim to legitimate authority but also a sufficient condition for law to have authority. Raz says,

> it is an essential feature of law that it claims legitimate authority... The law's claim to legitimate authority is not merely a claim that legal rules are reasons. It includes the claim that they are exclusionary reasons for disregarding reason for non-conformity.[46]
>
> The law has authority if the existence of a law requiring a certain action is a protected reason for performing that action; i.e. a law is authoritative if its existence is a reason for conforming action and excluding conflicting consideration. 'Reason' here means a valid or justifiable reason, for it is the legitimate authority of the law which is thus defined. The law enjoys effective authority, as we saw it, if its subjects or some of them regard its existence

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[45] Raz, PRN, p.145.

[46] Raz, AL, p.30.

as a protected reason for conformity.[47]

Raz's remarks above suggest that (1) law's claim to authority is to claim law as exclusionary reasons and that (2) if law is a protected reason and an exclusionary reason, then it has authority. For Raz, law's claiming to have authority is quite different from law's having authority. However, in both cases, law as authority is understood as law as exclusionary reasons. That is to say, Raz identifies the authority of law with the exclusionary force of law. Raz must then provide an explanation of how the claim made by law can justify law as exclusionary reasons. This leads us to examine Raz's theory of practical authority.

4. Raz's Theory of Practical Authority

If law as exclusionary reasons is necessarily a feature of law's authority, then it seems that neither any contingent feature about law nor some social fact of convergence in legal practice will give us much help here. Raz must offer an explanation which shows that it is the nature of law which gives rise to this exclusionary feature of law. Starting with the nature of law to claim authority, Raz shows us how this claim may be justified by the service conception of law through the Dependence Thesis and the Normal Justification Thesis, and finally leads to the Preemption Thesis, law as exclusionary reasons for action. This section is my reconstruction of Raz's arguments and the next section is a critical discussion of his theory of practical authority. According to Raz, the nature of law is to claim authority. This claim

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[47] Raz, AL, p.29.

> is manifested by the fact that legal institutions are officially designated as "authorities", by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as required to obeyed. [48]

This claim is justified by what Raz's calls the service conception of law. According to the service conception, law as an authority is legitimate to the extent it serves us. It promulgates directives which, if we follow them, are supposed to produce better results than the results if we acted on a direct calculation of what we ought to do. Briefly, law serves the governed. This service conception of law as authority is further supported by two moral theses: the Dependence Thesis and the Normal Justification Thesis. The Dependence Thesis states,

> All authority directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstance covered by the directives."[49]

As Raz claims, this is a moral thesis about the way in which a legitimate authority should use its power. Raz illustrates this thesis by using an example of how an arbitrator uses his power. The arbitrator cannot decide the dispute in terms of his own interests or ideas about what is the best for the disputants; rather he must decide the dispute in trust for the disputants in terms of the reasons which apply to them in their situation. That is, law should base its requirement on those things we should do anyway, such as request rights, strive for the common good, promote efficiency.

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[48] Raz, "Authority, Law, and Morality", Vol. 68, 1985, The Monist, 300.

[49] Raz, The Morality of Freedom, hereafter MF, (Oxford: Clarendon Press, 1986), 47.

But if those are the right things to do, what do we need law for? The answer is that we are not always able to do what we should do without authoritative rules. This is the basic idea of his second moral argument for legitimate authority - the Normal Justification Thesis.

> It claims that the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[50]

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[50] Raz, MF, 53. Two clarifications should be made here. First, the normal justification for authority, according to Raz, is only part of the full justification for acknowledging authority. Such a full justification must not only show that there are reasons for accepting the authority in question, but also that there are no reasons not to accept it. For instance, it is desirable for people to manage their own lives. In order that authority be recognized on a given manner, it must be shown that this consideration doesn't apply. (ibid. pp.56-7) Second, the normal justification for authority for being what it is, Raz believes that it does not apply in the context of the institutions of state and law regarding all matters and all citizens. He does not believe that the state and law have authority over all citizens in all matters. (ibid. chapter 4).

The Dependence Thesis shows how an authority should use its power, whereas the Normal Justification Thesis shows how a norm-subject is normally acknowledging a legitimate authority by this moral principle. To use the example of arbitrator again, two disputants will be better off if they just follow the arbitrator's decision rather than acting on their own reasons. Raz thinks that these two theses are mutually supporting in the sense that the dependence thesis is about the moral nature of authority, and the Normal Justification Thesis is about how the nature of authority is normally justified in its relationship with its subjects. These two theses together present "a comprehensive view of the nature and role of legitimate authority."[51]

The nature of authority is to serve the governed and a legitimate authority in its strict sense does not have its own particular interest. The authoritative directives should be based on the reasons for action which apply to the disputants and over which the controversy has arisen. Raz calls these "dependent reasons". The role of a legitimate authority is intended to replace those reasons in the disputants' practical deliberations. Given this conception (nature and role) of legitimate authority, Raz now is ready to "explain how it is capable of figuring in practical inference."[52] Says Raz, "since the justification of the binding force of authoritative directives rests on dependent reasons, the reasons on which they depend are (to the extent that the directives are regarded simply as authoritative) replaced rather than added to by those directives. The service conception leads to the pre-emption thesis."[53] Since the authoritative decision rests on the dependent reasons, it must represent the genuine interest of the disputants. Thus, when the disputants accept the authoritative status of the decision, their acknowledging an authority involves restraining them from actions based on reasons related to the content of authoritative directives. Your acceptance of law's authority implies a belief, on your part, that following authoritative directives will afford you more success, in keeping with the reasons for which you should act. In other words, the obligatory (normative) force of authoritative directives stems from the reasons that justifies them, the authoritative directive is able to play a preemptive role in guiding action of norm-subjects.

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[51] Raz, MF, 53.

This is precisely the idea expressed in Raz's Pre-emption thesis, according to which,

> the fact that an authority requires performance of an action is a reason for its performance which is not to be

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[52] For Raz authority is a practical concept and it must be investigated "in a way that shows its relevance to practical reasoning." Raz, AL, 11.

[53] Raz, MF, 59.

> added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.[54]

To use the arbitrator's example again, we can view authoritative directives much like the arbitrator's decision, that is, they too are meant to serve a mediating, exclusionary role.

> They [authoritative directives] mediate between deeper-level considerations and concrete considerations. They provide an intermediate level of reasons to which one appeals in normal cases where a need for a decision arises.[55]

The deeper level is a profound disagreement among a set of basic political and moral principles regarding right or wrong. On the lowest level, there are various judgments about particular cases. On the middle level, there are rules which provide reasons for people to act in conformity with what they require, despite the disagreement they have on the deep justification of those rules and despite the disagreement they have on the application of those rules. In other words, legal directives are represented as authoritative, as having a preemptive status. The pre-emption thesis shows the status of a binding authoritative directive as a special kind of reason for action and that people will be able to make their decisions on concrete cases and follow common standards of conduct even if they have profound disagreement on some fundamental political and moral issues.

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[54] Raz, MF, 46.

[55] Raz, MF, 58.

Now let me briefly sum up Raz's account of law as legitimate authority. According to Raz, it is the nature of law to claim authority and moreover the law's claim can be justified by the service conception of law, which is supported by the Dependence Thesis and the Normal Justification Thesis. The justified claim of law as legitimate authority entails the Pre-emption Thesis, which states that authoritative directives should be regarded as having exclusionary/preemptive force in guiding law's subjects' behavior and action.

5. Criticisms of Raz's Theory of Authority

Raz's theory of practical authority of law as exclusionary reasons can be challenged from two different directions. We may ask, Is an authoritative directive necessarily an exclusionary reason for action? Does a valid legal rule necessarily carry a pre-emptive force? We may also ask, Can Raz's positivistic idea of "law merely claims authority" justify the institutional force of law as exclusionary reasons for action? Does Raz by his account of practical authority as exclusionary reason really provide a content-independent account of the normativity of law? The difference between these two different lines of argument is this: under the former Raz's exclusive version of legal positivism is questioned through examining whether authoritative directives in law indeed function in an exclusionary/preemptive manner, whereas under the latter, Raz's supposedly value-neutral descriptive account of the normativity of law is challenged through scrutinizing the conception of law as claiming legitimate authority. The first line of criticism is represented by Waluchow and Dworkin, and the second line of argument is entailed in Shiner's criticism.

Waluchow challenges Raz's identification of the authoritative nature of law with the exclusionary force. Waluchow chooses one example used by Raz and tries to show that in some legal cases, statues and rules can be authoritative without being exclusionary/preemptive. Waluchow says,

> To recognize the authority of Parliament is not necessarily to accept that its decisions completely pre-empt and replace all of the reasons upon which they are based and upon which a judge might base her decision.[56]

Legislation may require that employers provide laid-off workers with fair severance pay but leave it to the parties concerned, or the courts should the issue come before them, to determine what in a particular case is in fact fair. In discussing this example, Raz himself recognizes, it is sometimes "better to settle for... laws ... that fix the framework only and leave the courts room to apply deliberative [i.e. dependent reason] within the framework."[57] If some dependent reason is used to determine what is supposed to be fair in this case, then it shows that "The statute is authoritative, then, even though it fails to pre-empt and replace all dependent reasons."[58] In applying this law, legislators in fact grant judges the authority to use their moral reasons to make a legal decision.

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[56] Waluchow, ILP, p. 138.

[57] ibid. 134.

What is really interesting is that while Waluchow in his Inclusive Legal Positivism severely criticizes Dworkin's normative theory of law, he has found common cause with Dworkin, who shares Waluchow's desire to undermine Raz's theory of authority with the doctrine of exclusionary reasons. Along with Dworkin Waluchow claims, "there is no reason to think that authority is an all or nothing exclusionary matter."[59] He quotes Dworkin,

> Raz thinks law cannot be authoritative unless those who accept it never use their own convictions to decide what it requires, even in this partial way. But why must law be blind authority rather than authoritative in a more relaxed way other conceptions assume? ... Any plausible argument must be an argument of political morality or wisdom, an argument showing why a practical distinction should be made between those justifications for coercion that are and those that are not drawn from exclusively factual source, and why only the former should be treated as law.[60]

For both Dworkin and Waluchow, to view exclusionary reasons as the nature of authoritative rules will require the subjects of authority to surrender their judgments and thus results in blind authority. Consequently, either in legal decision-making or the identification of legal rules, other dependent reasons such as political or moral considerations are excluded since these considerations necessarily require a more relaxed form of authority. However, as for the issue of how moral consideration should get into the ground of law, and as for the issue of how much role political morality should play in legal decision-making, Waluchow departs from Dworkin. For Dworkin, the exclusionary nature of authoritative directives leaves no room for political and moral interpretations of the nature of law, while for Waluchow Raz's exclusive positivism illustrated by the stiff notion of exclusionary reasons excludes even the possibility of including occasional moral consideration in identifying the existence of law.[61]

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[58] ibid.

[59] ibid. 136.

[60] Dworkin, Law's Empire, 429-30.

I think that both Waluchow's and Dworkin's criticisms are strong in one sense and weak in another sense. They are strong in the sense that their criticisms refute Raz's claim that the institutional force of law as authority is always identified with a particular kind of force - exclusionary. They are weak in the sense that even if Raz is wrong to identify law's authority with the exclusionary force of law, it does not follow that moral and political considerations necessarily get into the issue of identification of the existence of law. We may consider Schauer's presumptive positivism or MacCormick's institutional positivism as a viable option, either of which is a legal positivist theory without adopting Raz's doctrine of exclusionary reasons.

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[61] It seems to me that the real difference between Dworkin and Waluchow is their methods of how political morality may get considered in identifying the ground of law.

I shall pursue another line of criticism (of Raz's theory authority) proposed by Shiner, a criticism aiming at the normative implication entailed in Raz's account of the normativity of law in terms of his theory of authority. Shiner in his Norm and Nature proposes two interrelated criticisms of Raz's account of the normativity of law in terms of his theory of authority.[62] The first argument is designed to show that a positivist claim about legitimate authority entails that law does not violate certain required moral standards. The second argument, a functional argument, suggests that the fact the law necessarily claims legitimate authority may entail that law is designed to secure and fulfill certain values valuable to a society, or law must serve the purpose of justice. Shiner's criticism, in despite of its problems, raises one important issue, whether Raz's account of the legitimate authority will necessarily result in some anti-positivist implication. In the following I shall focus on Shiner's argument and Brenda Baker's objection to Shiner's criticism. I believe that the debate between Shiner and Baker provides us two possible interpretations of Raz's theory of practical authority. My intention is to show that if these two understandings are equally feasible, then there is a theoretical dilemma in Raz's account of authority of law as exclusionary reasons: either Raz's account of authority is too thin to explain the practical, exclusionary and normative function of law, or it is too thick to be qualified as legal positivism.

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[62] Shiner, NN, 122-36.

Shiner starts his argument with an example of a Ruritanian society. In the Ruritanian legal system, there is a statute prohibiting patients from suing doctors for malpractice. It might also be that Ruritanians in general, patients as well as doctors, regard that statute as authoritative since they might normally accept it from their point of view. Now Shiner argues, from our point of view this statute may not be genuinely justified as authoritative because it is not just. This seems to suggest that, "a notion of a claim genuinely being justified, and not merely of a claim believed to be justified, is in play here."[63] A legal system which lacks a basic protection to its citizens would fail to be genuinely authoritative. If this is the case, then the issue of whether authority is genuinely justified should be regarded as a matter of its meeting certain minimal moral standards. But this deep relationship between law and morality is obscured by Raz's idea that law claims authority. According to Raz, the fact that law claims authority entails the fact that law claims to have legitimate authority by virtue of the claim being open to justification by the normal justification thesis. The central idea of the normal justification thesis is that the alleged subjects should accept the directives of the alleged authority as authoritatively binding rather than by trying to follow the reasons which apply to them directly. Shiner argues that the term "acceptance" here involves some substantive belief we have and some "basic stance" towards certain values. "Our acknowledgement of the authority of a certain law is more deeply integrated into the fabric of our social life than the term 'acceptance' implies."[64] This poses a difficulty: we might believe that the authoritativeness of law is normally justified but in fact that it is not genuinely justified at all. That is, "that positive law will not be authoritative despite its claim to be so unless it meets moral standards."[65]

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[63] Shiner, NN, 123.

Baker's reply to Shiner's argument is quite simple but to the target. She claims,

> a legal positivist may accept, (1) the law necessarily makes a claim to authority, but from that it does not follow that law necessarily has genuine or legitimate authority; (2) societal acceptance of law as authoritative does not establish that law has genuine or legitimate authority; without saying (3) the law has genuine authority or is really authoritative only when the content of its rules meet certain standards of justice and

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[64] Shiner, NN, 124.

[65] ibid. 126.

morality.[66]

It seems that what Baker and Shiner disagree about is whether the conclusion (3) is implicitly or explicitly entailed by the premises (1) and (2), or to put it in a more general way, what Raz's two premises amount to. To see whether (3) is logically derivative from (1) and (2), it is crucial to understand the precise meanings of (1) and (2) in the context of Raz's account of authority. Premise (1) suggests that there is a distinction between the fact that law merely claims authority and the fact that law indeed has the legitimate authority it claims to have. Premise (2) suggests that there is a distinction between the statement that people believe (or accept) that law has legitimate authority and the statement that law actually has legitimate authority. To put (1) and (2) together, we actually have three distinctive statements here. (a) Law claims authority. (b) People believe that law has legitimate authority. (c) Law has legitimate authority or law has a justified claim of authority.

Now what are the relationships between these three statements? Does (a) entail (c)? Does (b) entail (c)? Or do (a) and (b) together entail (c)? Finally, does (c) entail that law must serve the purpose of justice?

For Raz, what is essential for the very existence of a legal system, I believe, is the statement (a) and not the statement (c). It is the nature of law to claim authority and this claim entails laws as exclusionary reasons. Raz says: "it is an essential feature of law that it claims legitimate authority... The law's claim to legitimate authority is not merely a claim that legal rules are reasons. It includes the claim that they are exclusionary reasons for disregarding reasons for non-conformity."[67] Furthermore, unlike other legal theorists who carefully make distinctions between de facto authority and de jure authority, Raz does not think those distinctions important in his account of practical authority.[68] To Raz, the nature of law to claim authority is also a claim of legitimate authority or moral authority. Raz says:

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[66] Brenda M. Baker, "Law's Normative Authority: Necessary or Contingent?", Conference Paper in the Canadian Society of IVR (1994), 2.

> The decisive argument concerning the meaning of statements of legal duty is that the law claims for itself moral force. No system is a system of law unless it includes a claim of legitimacy, of moral authority. That means that it claims that legal requirements are morally binding, That is that legal obligations are real (moral) obligations arising out of law.[69]

For Raz, there is a substantial difference between the statement "law claims authority, legitimate authority or moral authority" and the statement "law has authority, legitimate authority or moral authority". It is by this distinction that Raz is able to claim that a system of norms is a legal one regardless of its having justified legitimate authority. That is to say, the existence of law doesn't depend on the moral legitimacy of law.

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[67] Raz, AL, p.30.

[68] See George Christie, Law, Norms and Authority, (Duckworth, 1982), part III; Max Weber, Economy and Society, (G. Roth and C. Witlich ed. 1968), p. 215-16, 226-48. Also see Raz, AL, Chapter 1 and 2, MF, Chapter 1-4,

[69] Raz, "Hart on Legal Rights and Legal Duties", Oxford Legal Studies, vol. 4, 1984, p. 131.

The issue in question is this. To Raz, law's claiming authority entails a claim that the authoritative nature of law is identified with exclusionary reasons. We can agree that the mere claim of authority made by law is sufficient for explaining the existence of law, but still question whether the positivistic idea of "law merely claims authority" is sufficient for law's subjects to take laws as practical reasons for following the law. Or alternatively, we may ask, can the institutionalized normative force identified as exclusionary be justified or explained by the mere claiming authority made by law? Is the mere claim-authority sufficient for justifying law as exclusionary reasons which require judges and private citizens to exclude or discredit all otherwise valid considerations to conform with what laws require? This set of questions addresses the issue of the normative force of law. I think that while the condition of law-having-moral-authority is too strong for the existence of a legal system, the condition of law-claiming authority is too weak for supporting the claim that laws are exclusionary reasons for action. That is why Raz needs the statement (b), people believe that the claim-authority made by law can be justified, or that the alleged subjects should accept the directives of the authority as exclusionary reasons.

Notice here that for Raz there is a difference between the statement that the claim-authority can be justified under certain conditions and the statement that law is actually justified as legitimate and moral authority. The exclusionary/normative force of law can be explained, according to Raz, only if we can articulate the conditions under which the claim-authority is justified. Indeed, only then does law generate obligation on its subjects. As Raz says, "In other words the law claims that its rules and rulings are authoritative. To establish an obligation (in the strong sense) to obey the law, as commonly understood, is to establish that its claim is justified, that the law indeed has the legitimate authority as it claims to have."[70] Again, the issue here is under what conditions the mere claim made by law can be legitimately justified.

According to Raz, it is the normal justification thesis that lays down the conditions for people to believe that law-claiming-authority can be justified. The need for the normal justification thesis indicates that the mere claim made by law, though sufficient for the existence of law, may not be a sufficient condition for people to accept law as exclusionary reasons for action. Law cannot be law without being able to make this claim. However, the mere capability of law's making authority-claim is not enough to explain why law should be regarded as exclusionary reasons for action or how law is able to generate an exclusionary force on its subjects. For anyone who is going to regard law as exclusionary reasons for action he or she must at least believe that the mere claim authority is legitimately justified. That is why Raz inserts the service conception of law, the dependence thesis and the normal justification thesis between law's claiming authority and the pre-emption thesis. He wants to show that under these specialized conditions people may believe that law's claim of authority can be justified - you would be better off if you obey the law than if you don't obey the law. That is why Raz says that the normal justification thesis will lead to the preemption thesis.

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[70] Raz, AL, 237.

The crucial question is this: Does the condition specified under the normal justification thesis either explicitly or implicitly entail some given substantive requirements of critical morality? We can answer this question in one of the following two ways. One could say that the normal justification thesis as it stands cannot prevent a legal system from claiming authority even without adopting some fundamental principle of justice or fairness. For example, at least for the last forty years, the Chinese legal system has claimed its legitimate authority over its people without the principle of the presumption of innocence. Now are we g\oing to deny that Chinese legal system was a legitimate legal system in the past forty years? This is the line of Baker's argument.

One might also say that of course we can recognize the Chinese legal system as a legal system, but is there any ground for its people to believe that such a legal system genuinely has its normative force by providing exclusionary reasons for action? Maybe not. When we introduce Raz's notion of exclusionary reason into the picture, the theoretical issue with which we are concerned here is not a simple issue of the identification of law anymore, rather it is an issue of the normativity of law. By introducing the very notion of exclusionary reason, Raz intends to analyze law as it is in our lives - law lives in the realm of the practical. Law is something we live by, we use to structure and guide our lives, we take as practical reasons for action. Clearly the strict idea of "claims to be authority or an exclusionary reason" is far too thin to explain those practical roles and functions law actually has in our lives. According to Raz, "the key to the problem of the normativity of law is not that laws are valid reasons but that people believe that they are".[71] Furthermore, Raz says: "for an authority is legitimate only if there are sufficient reasons to accept it, i.e. sufficient reasons to follow its directive regardless of the balance of reasons on the merits of such action."[72] To use Raz's terminology, the sufficient reasons referred to here must include the idea that law genuinely serves the governed. We can easily translate this statement into another statement, that law must serve for the common good or justice. Imagine the Ruritanian example again. The question here is, would Ruritanians be better off if they accept and obey the statute prohibiting patients from suing the malpractice of doctors rather than by trying to follow the dependent reasons which apply to them? If the Ruritanians like us have rational minds, then the only sensible answer to this question is "no". The negative answer entails that certain substantive criteria of morality will necessarily figure into consideration when the normal justification thesis is actually used. For law to be exclusionary reasons for action, people must genuinely believe that their essential interests are properly served by what governs them. This line of argument is entailed in Shiner's criticism.

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[71] Raz, PRN, p. 170.

[72] Raz, MF, 40.

To summarize the debate between Baker and Shiner, we see two different lines of arguments. On the one hand, Baker is right to suggest that the strict positivistic idea of "law claims authority" does not entail that the existence of law must meet certain substantive requirements of moral consideration. As a result we must say that Raz's idea of claim-authority is too thin to explain the exclusionary role law plays in our lives. On the other hand, Raz's notion of law as exclusionary reasons genuinely accepted by people who believe that law-claim-authority is legitimately justified may potentially lead to "the concept of an institution internally related by design to the fulfillment of certain valuable social functions and this internally related to the possession of authority"[73], as suggested by Shiner. If this is the case, then Raz's account of practical authority entails a thick notion of the normativity of law which disqualifies his theory as legal positivism.

6. Raz's Detached Approach to the Normativity of Law and its implications

Raz doesn't seem to be concerned about the potential inconsistency between these two different ideas entailed in his account of the normativity of law. This seeming inconsistency can be easily explained by Raz's detached approach to the normativity of law. According to this approach, we can recognize the thick notion of law's normativity without committing ourselves to accepting this thick notion. We, as legal philosophers, can still descriptively explain the thick notion of the normativity of law without suggesting that the thick notion of normativity of law is justified.

In his Authority of Law Raz suggests that we should advance beyond Hart's distinction between the internal legal statements and external statements. In The Concept of Law, Hart makes a distinction between external statements and internal statements. Internal statements are those applying the law, using it as a standard by which to evaluate, guide, or criticize behavior. External statements about the law are those about people's practices and actions, attitudes and beliefs about the law. Raz criticizes that Hart 's distinction "tends to obscure from sight the existence of a third category of statements".[74] Raz believes that there is an important third category of statements which are characteristic of legal scholars.

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[73] ibid. 133.

> A detached normative statement does not carry the full force of an ordinary normative statement. Its utterance does not commit the speaker to the normative view it expresses. Legal scholars can use normative language when describing the law and make legal statements without thereby endorsing the law's moral authority. There is a special kind of legal statement which, though it is made by the use of ordinary normative terms, does not carry the same normative force of an ordinary legal statement.[75]

A detached approach allows a positivist like Raz to admit the existence of the committed statements, and "... would want to allow, as we observe, for the possibility of non-committed detached statements, i.e. ones which though not committed are nevertheless normative."[76]

As Schauer suggests, the notion of detached normative arguments is very important for any legal positivist who is willing to take the issue of the normativity of law seriously. He says, "Here if the meat-eater can say 'You shouldn't eat that' to the vegetarian inadvertently about to have soup made with a meat-based broth, then, as Hart, Raz, and MacCormick have argued, one can make a statement presupposing the existence of a norm without in fact being morally committed to that norm."[77] That is to say, the notion of a detached normative statement would allow either a participant or an observer to make a fully committed normative statement in law without accepting the values behind the statements.

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[74] ibid. 155.

[75] ibid. 156.

[76] ibid. 158-9.

The detachment statement creates a possibility for judges and citizens to express their uncommitted views on the normative nature of law. For example, it is quite plausible to say that judge Lance Ito has the detached attitude towards the statements he is going to make to LAPD Mark Furman in the court. Notice that it is a quite different issue whether the normative force of a legal statement uttered by judge Lance Ito indeed can be detached from its deep connection to its underlying justification for this particular legal order or from its essential attachment to the normative nature of American legal system. To use Raz's example of the vegetarian again, we can say to our vegetarian friends "You should not eat that dish" with an ironic tone and/or without being a vegetarian. What justifies our use the word "should" is the fact that we know that the word "should" carries its fully-blood sense of normativity or moral commitment in the world of vegetarians (such as Tom Regan). It is not our uncommitted statement that gives any meaning to this statement, instead our statements can make sense only if they are attached to a committed and normative attitude.

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[77] Schauer, "Critical Notice of Roger Shiner Norm and Nature: The Movement of Legal Thought", CJP, Vol. 24, 1994, p.499.

That is to say, to suggest the distinction between committed judgments and detached judgments, we must first assume that the committed legal judgments are normatively value-laden. To make sense of a detached statement we have no choice but to understand the nature of a committed statement. As Raz himself realizes "admittedly, statements from a point of view are parasitic on the full-blooded normative statements."[78] If this is the case, then Raz's detached approach to the normativity of law does not and cannot prevent legal theorists such as Honore, Postema and Shiner from digging out the substantive values behind the normative force of law.

However, a legal positivist like Raz can still claim that a detached approach is supposed to provide a descriptive-explanatory understanding of the normativity of law regardless of what the normative nature of law may be. Now I shall turn to examining this claim.

So far I have discussed Raz's three main doctrines: the notion of exclusionary reasons, his account of practical authority and his distinction between a detached and a committed statement. To see whether Raz describes the normative nature of law in purely factual terms, we must figure out the relationship between his three doctrines and how they fit together to offer a positivistic account of the normativity of law. The following is my reconstruction of Raz's argument.

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[78] ibid. 159.

Raz's notion of exclusionary reasons has two different senses. The thin sense of exclusionary reasons refers to the role an authoritative directive plays in a piece of practical reasoning. The thick sense of exclusionary reasons refers to the institutional force of law identified as providing law's subjects with content-independent reasons for action by virtue of excluding all other considerations except those identifiable by legal sources.

Raz's notion of law as practical authority also has two senses. Its thin sense refers to the nature of law to claim authority and its thick sense refers to the justifiability of law as possessing legitimate authority by people who believe that law's claim of authority is justified under the condition stipulated by the service notion of law and the normal justification thesis.

Finally we have the division between the committed normative statements and the detached normative statements. The formal refers to full-blood normative statements which are expressed by the participants who accept law as justified legitimate/moral authority and law as providing the exclusionary/normative reasons for them to obey the law. The latter refers to descriptive language containing ordinary normative terms and having normative weight without committing the speakers to the normative position entailed by a committed normative statement.

The crucial point here is how each pair of the three distinctions conceptually connects with each other in Raz's account of the normativity of law. Raz starts with the thin sense of exclusionary reasons and makes his move to the thick sense of exclusionary reasons by introducing the thin sense of practical authority. Clearly he realizes that the mere logical possibility of the nature of law to claim authority is not sufficient for supporting the normative force of law identified by his thick sense of exclusionary reason. Then he further articulates the condition(s) (the normal justification thesis which leads to his presumption thesis) under which the thin sense of authority could turn into the thick sense of law as legitimate or justified authority. Clearly it is by his thick sense of law's claiming authority as justifiable and legitimate authority that Raz is able to explain the exclusionary or normative force of law. Finally, he claims that a legal scholar (or rather a legal positivist) need not commit himself to this thick/substantive notion of law's normativity and he can simply describe a legal point of view from which the normativity of law can be explained and understood.

If my reconstruction of Raz's account of the normativity of law is correct, then Raz is not able to consistently argue from a formal sense of exclusionary reasons, through a thin sense of law's claiming authority, to a notion of detached normative statements. That is to say, Raz is not able to consistently use non-normative language to describe the normative nature of law. If he were able to do so, then Raz would have to use only the formal sense of exclusionary reasons, the thin sense of practical authority and the detached normative statements. The very fact that Raz introduces those thick senses of exclusionary reasons, practical authority and committed normative statements to explain the normativity of law shows that Raz's account cannot be purely descriptive/explanatory in nature. As I explained the last two sections, the exclusionary force of law cannot be explained and justified independently of people's normative acceptance and belief that law's claiming legitimate authority and morality is justified. And moreover, the detached legal statements cannot be made without assuming the validity of the fully committed normative statements. That is to say, Raz must go beyond his seemingly neutral theory of practical reasoning and a purely sociological or jurisprudential investigation to look for some more general explanatory/justificatory account of the normativity of law.

Conclusion:

--- Do We Need a Higher Social Theory?

In the first part of thesis, I argued, contrary to a common belief that the problem of normativity of law is best dealt with by natural law theory, that the issue of the normativity of law, strictly speaking, does not arise as a problem for natural law theory. If the central doctrine of natural law theory (regardless of its any particular form) is understood as law essentially based on morality, then natural law theory will not be able to grant any distinctive normative status to law separate from morality. I further argue that the issue of the normativity of law does arise as a problem for legal positivism, since emphasis on the distinctive character of law from morality is a mark of legal positivism and furthermore since positivism is so concerned to give a value-free account of the nature of law. I further argued that if the normative aspect of law is understood as an essential part of nature of law, then providing an intelligible understanding of the normativity of law, for legal positivism, should be viewed as being as much important as offering a theory about the identification of the existence of law. I claimed that to solve the problem of normativity constitutes a genuine challenge to legal positivism. It is to give an account of law's normativity without "undercutting a positivist account of law's ontology" as Schauer suggests, and without "giving up the separation thesis" as Postema suggests.

The deep issue raised here is the following. As a prephilosophical datum, a legal system is an institutionalized normative system. Law belongs to the domain of practical reasoning, law affects our conduct and law guides our action. Law, in short, is by nature normative. Legal positivism by its very nature claims to be a descriptive-explanatory theory about the nature of law and insists that the nature of law should be viewed as conceptually separated from morality. There is an immediate paradox therefore in seeing how a theoretical project which is self-consciously purely descriptive can give an adequate account of an institution which is normative in nature.[1]

In the last three parts of my thesis, I examined Kelsen's concept of juristic normativity, Hart's concept of social normativity and Raz's concept of practical normativity. Each of them, from his unique perspective, provides a distinctive understanding of the issue of the normativity of law. However each in some way fails to provide an adequate account of the normativity of law without damaging the very assumption of legal positivism.

Kelsen attempts to overcome the traditional dichotomy between legal positivism and natural law theory within the Humean division of fact and value through his Kantian methodology. From a juristic point of view, he explains how a legal norm gains its normative force from a dynamic and interrelated system of norms to which it belongs and how a system of norms derives its final justificatory source from the basic norm - juristic consciousness and legal ideology. As I suggested in Part II, to presuppose the basic norm as the transcendental condition of understanding the normativity of the highest positive norm - the constitution, Kelsen has already located its social source of law's normativity in a much broader normative universe where law is integrated with other social and normative activities including moral, political or economic, historical, social and ideological.[2] This requires us to go beyond the domain of traditional jurisprudence understood in the legal positivist tradition.

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[1] I don't think that there is a similar paradox when it comes to the issue of the identification of the existence of law. This is exactly the reason of why the issue of law's normativity is exciting.

Hart as a loyal student of Hume is obviously dissatisfied with Kelsen's normative notion of validity as well as his "juristic hypothesis" - the basic norm. For Hart, Kelsen's problem in the last stage in his pure theory is directly derived from his denial of law as a social fact in the beginning of his theory. According to Hart, to adopt the normative notion of validity entails an immediate danger of surrendering the moral connection thesis. As he says, to adopt the normative notion of validity is to "regard a particular rule of law as valid and at the same time ... to accept, as morally binding, a moral rule forbidding the behavior required by the legal rule."[3] He also thinks that the mysterious notion of the basic norm obscures the factual nature of law. For Hart, we shall replace the basic norm with a rule of recognition, which is

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[2] This sounds very like Dworkinean conception of law as integrity. But the difference should be obvious. Kelsen has never thought that he can use an interpretive method with loaded values from political morality to make sense of the concept of law. More importantly, Kelsen's presupposed basic norm only suggests that we may have to go beyond a system of positive legal rules to find the justification for the normativity of law. As for the status of the principle or theory (whether it is value neutral or value free) it is an open question. From what we know about Kelsen's view on morality and politics, there must be something objective rather than subjective interpretation of law.

> a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criterion it provides, then ... it seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who 'laid it down') are to be obeyed ... This is the accepted rule and it is mystifying to speak of a rule that this rule be obeyed.[4]

Clearly Hart's solution is to add more social facts - facts about the rules of recognition and facts about the authoritative reasons. As Paulson correctly points out, Hart is unwilling to give up the positivist project of explaining the normativity of law in factual terms.[5] In The Concept of Law, Hart tries to provide an understanding of the obligatory nature of law in terms of his notion of social rule and in his Essays on Bentham, Hart insists that the problem of the normativity of law can be resolved on the ground of our legal practice. However, Hart's internal point of view drags us back to the issue of the normative attitude of legal officials' and citizens' toward the law. As Postema forcefully points out, Hart's detachment argument fails to show that the normative term "obligation" has a different meaning when it is used in legal and moral contexts. And the normative nature of officials' commitment to law cannot simply be explained by their recognition of the criteria of legal validity in legal practice. That is to say, the mere social facts of officials' convergence in believing the same fundamental rule of recognition and of officials' convention in practicing authoritative reasons for applying the laws are not sufficient to justify the legitimacy of their acceptance of the criteria for validity and their imposing legal obligation to law's subjects. It is a very different issue whether we should take Postema's suggestion that a moral and political concern must be involved in providing justifying reason for the legitimacy of accepting and applying the law.[6] But it is at least safe for us to say that Postema's forceful criticism shows that it is inadequate to explain the normativity of law simply in terms of Hart's social fact thesis and his semantic thesis. We must go a further step to look for some justificatory principle beyond the understanding of law merely as a social fact and of legal practice merely as convergence of officials' beliefs and practice.

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[3] Hart. CL. 246.

[4] Hart, CL, 245.

[5] See Paulson, "Continental and British Normativism" (1993), p. 228-35.

Raz is an excellent student of both Kelsen and Hart. On the one hand, following Kelsen's lead, Raz takes the issue of the normativity of law very seriously and insists that a legal norm provides a reason for action. On the other hand, following Hart, Raz proposes his strong social thesis - the sources thesis (the identification of the existence and content of law is independently of any moral consideration). However, Raz does not think that law as a normative enterprise can gain its justification within a theoretical critique of the Kantian sort, as Kelsen does. He also completely abandons Hart's semantic thesis and refuses to attempt to explain the normative language in legal statements in factual terms. For Raz, law functions in the domain of the practical, and legal norms are practical reasons for action. From his theory of practical rationality, he first identifies the formal feature of practical normativity of law as that of being a system of exclusionary reasons. For Hart, the obligatory nature of law can be explicable only if we look at it from the internal point of view. For Kelsen we can make sense of the normativity of law only when the transcendental condition of basic norm is introduced. For Raz, his doctrine of exclusionary reasons does make the normativity of law explicable without introducing an internal point of view or a transcendental condition.

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[6] See, each of N. MacCormick and D. Lyons, "Comments", in Gavison, Issues in Contemporary Legal Philosophy: The Influence of H. H. L. Hart, (Oxford: Clarendon Press, 1987, pp. 105-113, 114-126.

However, the exclusionary force can be identified with the institutional normative force of law only if the doctrine of exclusionary reasons can be substantiated by an account of the authoritative status of law. According to Raz, the formal and conceptual analysis of the normativity of law in terms of the notion of exclusionary reasons must be backed by his justificatory arguments from his political theory of practical authority.[7] Raz's move seems to indicate his willingness to find the justificatory source of the normative force of law or to give an account of law's normativity in terms of certain principles external to his social source thesis and external to analytic jurisprudence traditionally practiced by legal positivism.

Is it a coincidence that all three leading legal positivists from different paths go toward the same direction? They start from their positivist position to search for the normativity of law and they end at a point beyond their positivist position - to look for a justificatory source for the normativity of law from a broader normative universe and to explain law's normativity in terms of something other than purely descriptive social facts.

In the following, I try to show that it is not the subjective intention of each legal positivist, Kelsen, Hart, and Raz, to head in this direction. Rather it is the very problem of the normativity of law itself that forces them to go beyond the traditional boundary of legal positivism.

In his essay on Justice Holmes and the Nature of Law, Morris Raphael Cohen warns us against "doing away altogether with the normative point of view in law."[8] He makes it clear that a fruitful study of law cannot be built if we restrict ourselves to the task of mere description of the uniformities of behavior and the conditions of the existence of positive laws. From his point of view, since legal rules are binding and a legal system is normative, contemporary legal philosophy has no choice but takes this normativity and bindingness of law to be a pre-analytic datum to be accounted for by legal theory.

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[7] Raz, PRN, 194-5.

But Cohen's suggestion seems hard to accommodate for analytic jurisprudence practiced in the tradition of legal positivism, as what Jeremy Bentham called expository jurisprudence or as what Austin called analytic jurisprudence.[9] As the terms "expository" and "analytic" suggest, the sole task for an expositor in legal philosophy is to describe and analyze the concept of law and to deal with the issue of the identification of the existence of law. The central idea of analytic jurisprudence is understood as a value-free representation of law, rather than an evaluation of law. Bentham's distinction between two kinds of jurisprudence can be understood as the Weberian idea of establishing a value-free social science. Weber explains,

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[8] M. R. Cohen, Law and Social Order, (Hampden, Conn.: Archon Books, 1967), 204.

[9] Jeremy Bentham once made a distinction between expository and censorial jurisprudence. If normativism is censorial jurisprudence, then non-normativism can be understood as expository jurisprudence. Bentham considers himself as an expositor, which plays a "humbler function" than the censor. A Fragment on Government, Collected Works, Ed. by J. H. Burns and Hart, 1977, 309, 404.

> What is really at issue is the intrinsically simple demand that the investigator and teacher should keep unconditionally separate the establishment of empirical facts (including the 'value-oriented' conduct of the individual whom he is investigating) and his own practical evaluations, i.e., his evaluation of these facts as satisfactory or unsatisfactory (including among these facts evaluations made by the empirical persons who are the objects of investigation.).[10]

While the object of a theory can be value-laden, the theory must be a value-free description. Applying this idea to legal theory, Neil MacCormick suggests,

> What positivists assert to be possible is a neutral or value free representation of the law of a given state --- not the possibility of that the law is itself value free.[11]

While what the laws present can be viewed as fully loaded with the dominant ideologies, moral principles and political ideas of a place and time, our understanding or representation of the nature of law should be value free. That is, a legal theory should be a descriptive and explanatory interpretation of what might be value-laden subject matter - law and legal practice. MacCormick continues ,

> What it does not do is to lead us to think that their quality-as-law is the same thing as that which makes them an expression of dominant ideology, class interest, or whatever. For this stand of anti-normativism to hold water, remember, it has to be the case that there is a non-

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[10] Max Weber, The Methodology of the Social Sciences, 1949, p.11.

[11] N. MacCormick and Ota Weinberger, An Institutional Theory of Law, (D. Reidel Publishing Company, 1986), p.3.

normativist explanation of their quality-as-so-called-law.[12]

This paragraph is often taken as one of the key ideas of analytic jurisprudence practiced by legal positivism. One popular reading of this paragraph is the following. The subject matter of legal theory is the concept of law, which takes the form of a list of criteria for something to be qualified as law, such as Hart's notion of the master rule of recognition and MacCormick's notion of the institutional features of a rule. The list of criteria is referred to quality-as-law, which is very different from what laws express (the content of law), and it can be only described by an explanatory theory of law (a method of analyzing the concept of law). There are two key points for a legal positivist theory of law: a value free presentation of the nature of law and a value free identification of the existence of law.[13]

Very well so far. Now let's go a step further to ask one more question. Is normativity a quality which makes law as law? Can law exist without its normative bindingness and being normatively obeyed? If normativity is regarded as one of the essential qualities (feature or characteristic) of law, the question then is, will normativity as one of the essential qualities as law be value-laden?

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[12] Ibid. p.4.

[13] Waluchow's inclusive legal positivism is an exception, since his theory is satisfied with the first criterion but not the second. But again, is his inclusive legal positivism a genuine form of positivism?

Or can the normativity of law be explained in terms of the factual terms?

As soon as the issue of the normativity of law is introduced to the picture, it seems that we cannot really view legal positivism as only a theory of value free representation of value-free quality of law. In this sense, Schauer's response to Shiner's challenge to sophisticated positivism is quite justified when he claims that we may not need to get into the issue of law's normativity in the first place. Simple positivism can offer an explanation of the prescriptive force of law without explaining the normativity of law.[14] This may be true. However the question in which I am interested is not how a simple coercive/prescriptive force of law can be explained within a model of simple positivism. The very issue here is, if we do take the normativity of law as one aspect or defining nature of law, can an account of the nature of law be purely descriptive?

The normative quality of law and the practical aspect of the concept of law require a new outlook for the project of legal study. To introduce the issue of the normativity of law into a legal study has two theoretical implications. On the one hand, law, being normative, lives in a normative universe and thus shares certain common features with other normative behaviors, such as moral, political or even religious. Normativity, being law's normativity, indicates that there is a particular kind of normativity which is distinguishable from other normativities. These two aspects of the normativity of law determine that law must be regarded as both an open and closed system. Being an open system, law must be understood in a broad normative universe and in relation to its social attachments; being a closed system, law must be a distinct social institution, which is identifiable by its own social source and normative impacts.

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[14] See Schauer's critical notice in CJP. I am not concerned with the issue of whether simple positivism can or cannot offer an adequate account of law's normativity in this thesis. On this issue, my intuition is this. A simple positivist such as Bentham does have a very rich explanation of the normativity of law - the normativity of law is purely justified by a certain substantive political and moral theory (in Bentham's case, it is his utilitarianism). Simple positivism is quite different from contemporary legal positivism in that the issue of law's normativity is simply excluded from jurisprudence.

Given the particular task of legal study, a new type of legal theory is needed. William Twining, in a paper published in 1979, suggested,

> Even one hundred and fifty after Bentham's death, the implications for the study of law of the broad perspectives of social theories, such as Marx, Weber and Durkheim were as yet unexplored. To put the matter in a simplified form: English legal theory had yet to be integrated with social theory.[15]

Under the tradition of Oxonian legal philosophy, legal scholars have taken too much for granted the criteria of relevance of Austinian analytical jurisprudence, and they have paid almost no attention to the systematic and persistent exploration of the nature of law within a social context. They did not realize that "the study of rules alone is not enough for the understanding of law"[16] Says Twining, although a group of leading legal scholars, such as Hart, Dworkin, Honore, MacCormick, Raz and Summers, has explicitly argued that law should be viewed as a social phenomenon,

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[15] W. Twining, Academic Law and Legal Philosophy: The Significance of Herbert Hart", The Law Quarterly Review, Vol.95, 1979, p.557.

> "Yet if law is to be viewed as a social phenomenon, it would seem to be worthwhile at least to explore the relationship between legal theory and social theory, in particular possible connections between theories of law and social theories."[17]

Twining explicitly emphasizes that his concern is the nature and scope of jurisprudential activity within academic law. Twining suggests that we may need something called High Theory at a high level of abstraction such as most of analytic jurisprudence and with a broadened domain accommodating explanations of social aspects of law. He says,

> High Theory, that is to say, the exploration of fundamental general questions related to the subject-matter of law-as-a-discipline, for example, questions about the nature and functions of law, relations between law and justice, or the epistemological foundations of different kinds of legal discourse.[18]

A similar thought has also been expressed by other prominent legal scholars. Raz, when he starts to focus on the problem of the nature of law, claims, "[a]t the level of the highest philosophical abstraction the doctrine of the nature of law can and should be concerned with explaining law within the wider context of social and political institutions."[19] Ota Weinberger in a book with Neil MacCormick expresses more explicitly this idea. Says Weinberger,

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[16] Ibid. p.571.

[17] Ibid. p.566-567.

[18] ibid. p.575.

> A legal theory which aims to achieve knowledge of the legal phenomenon - and not to remain at a standstill purveying schemata for logical relations in possible systems - has to study the real existence of the normative system in its social reality - which corresponds to the existential aspect of the norm.[20]

Laws are created by human beings and they function in human society. Law being created by human beings is a thought-object and must be conceptually investigated; law as practiced in reality must be socially understood. However, legal philosophers should neither indulge themselves in the exegesis of pure conceptual and analytical comprehension of an isolated legal system nor should they be attracted by moral or critical evaluation of law. Weinberger,

> every approach to the law which leads to greater understanding of law and to the explanation of its essence and its social role, is juristic. ... I am convinced that the jurist must also ask questions which concern the social existence of law, its way of operating in society and the relations between law and society. In my opinion these are all proper questions for jurists.[21]

The deep thought suggested by Twining, along with Cohen, Raz and Weinberger, is the same, that is, at a certain level of legal study, the practical aspect of law must be investigated and analytic jurisprudence *has to integrate with a broad social or political theory* of law. This thesis can be essentially viewed as a response to the calls from those scholars.

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[19] J. Raz, "The Problem about the Nature of Law", University of Western Ontario Law Review, Vol.21, 1983, p.216-217.

[20] Neil MacCormick and Ota Weinberger, An Institutional Theory of Law, (D. Reidel Publishing Company, 1986), p.44.

[21] Ibid. p.45-6.

Now the question here is this. Is a high social theory of law a purely descriptive or normative in nature? It is often suggested by natural law theory that the normativity of law must be explained and justified in terms a value-laden political or moral theory. I don't think that this alternative is too helpful for a very simple reason. If we indeed take the normativity of law, as I suggest earlier, as a defining quality of law, then to say that law's normativity must be explained and justified by political morality is conceptually equivalently to saying that the very existence of law is based on those identifiable moral values. This immediately commits ourselves to an unacceptable position, that is, law without certain moral values is not law. We are back to square one - the simple version of natural law theory.

The only alternative seems to be that a high social theory may be descriptive-explanatory in nature. Now the difference between a descriptive theory within analytic jurisprudence practiced by legal positivism and a descriptive theory at a higher level - at the level of social, political, moral ideological theory may this: the former uses legally related social facts as proper way of explaining the nature of law, while the latter allows various political, moral and social theories to explain how and why law obtains its unique source of normativity. Those high social theories themselves may not be value-neural. It does not matter as long as the underlying values of those high theories are opaque to the subject matter - in this case the nature of law.

To summarize what I have said so far, I suggest that if law is understood in the context of social practice and a legal system exists in the domain of a normative universe, then it means that we have to go a step further to look at the deep connection between law as a special kind of normative phenomenon and other normative phenomena. We may need a "high social theory" of law which can help us explain the uniqueness of law as a distinctive institutionalized normative system within a broader normative universe.

But what exactly is the form and content of this high theory? Is it political, moral, historical, ideological, or social in nature? Or is it a combination of all these aspects of our social life? Or is it a set of social theories? I do not know. From overwhelming contemporary literature in legal philosophy, I have seen in a few papers that some scholars have consciously or unconsciously headed their works in this direction. These include Schauer's view on the nature of legal rules as allocation of power and legal obligation as a positional obligation,[22] Chaim Gans' discussion on the normativity of law and its co-ordinative function,[23] Leslie Green's consent theory as a material justification for the normativity of law,[24] Shiner's discussion on jurisprudence as a combination of analysis and ideology,[25] Raz's theory of law as coordination,[26] Edna Ullmann-Margalit's game-theoretical explanation of the normative nature of law,[27] Robert Alexy's theory of law as rational argumentation.[28] What is common among all these works seems to be their efforts to provide an understanding of the nature of law beyond the traditional theme of legal positivism - to identify the existence of law, and their efforts to go beyond the domain of analytic jurisprudence - to give a pure factual and descriptive analysis of law. This may signify a new direction of philosophical studies of the nature of law. But to argue for this position is obviously a task which requires more than another dissertation.

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[22] Schauer, Playing by Rules: A Philosophical Examinations of Rule-Based Decision-Making in Law and in Life, (Oxford: Clarendon Press, 1991); "The Question of Authority", Georgetown Law Journal, Vol. 81, No. 1, 1992, 95-115.

[23] Gans, "The Normativity of Law and Its Co-ordinative Function", Israel Law Review, Vol. 16, 1981, 333-349. Also see, Philosophical Anarchism and Political Disobedience, (Cambridge University Press, 1991).

[24] "Law, Co-ordination and the Common Good", Oxford Journal of Legal Studies, Vol. 3, 1983, 299-324. "Law, Legitimacy, and Consent", Southern California Law Review, Vol. 62, 795-825; "The Political Content of Legal Theory", Philosophy of Social Sciences, Vol. 17, 1987, 1.

[25] Shiner, "Jurisprudence: Ideology and Analysis?", Canadian Journal of Law and Jurisprudence, Vol. 8, No. 2, 1993, 205-224.

[26] Raz, The Morality of Freedom, (Oxford: Clarendon Press, 1986).

[27] Ullmann-Margalit, The Emergence of Norms, (Oxford: Clarendon Press, 1977); "Is Law a Co-odinative Authority?", Israel Law Review, Vol. 16, 1981, 350-355.

[28] Alexy, Robert, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification, Trans. R. Adler and N. MacCormick, (Oxford: Clarendon Press, 1989).

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